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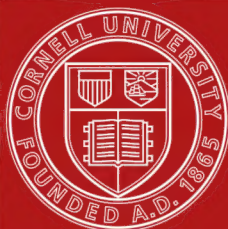
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**A treatise on the law of partnership.**



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A TREATISE  
ON THE  
LAW OF PARTNERSHIP,  
INCLUDING ITS  
APPLICATION TO COMPANIES.

FOURTH EDITION.

BY  
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ONE OF THE JUDGES OF HER MAJESTY'S HIGH COURT OF JUSTICE.

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# LAW OF PARTNERSHIP,

ETC.

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## SECTION III, CHAPTER III, BOOK II.

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### OF SET-OFF.

Closely connected with the subjects discussed in the two preceding sections, is the right of a defendant to set up, in opposition to the claim made against him, a counter-claim, which the defendant might himself make the subject of a cross-action against the plaintiff. The power of a defendant \*to do this is much \*503 more extensive than it was; for by Order XIX, rule 3, a defendant may set off or set up by way of counter-claim any right or claim, whether to a definite amount or not; but provision is made for disallowing a cross-claim if it cannot be conveniently disposed of in the particular action in which it is set up. A short account, however, of the law as it stood before this alteration, may still be useful.

#### 1. *Of set-off by and against partnerships.*

The right of setting off one claim against another appears only to exist at common law, where a person seeks to avail himself of a lien on goods his possession, but of <sup>1. Set-off at law.</sup> which he is not the owner. But, by statute 2, Geo. 2, c. 22, it is enacted "that where there are mutual debts between the plaintiff and the defendant, or if either party sue or be sued, as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the

other." (v) The statute, it will be observed, only mentions mutual debts, and this expression has been held to be confined, first, to debts in the narrow sense of the word, *i. e.*, definite and ascertained sums of money, owing by each party to the other (x); and, secondly, to debts owing to and by each party in one and the same capacity. (y)

Courts of equity, although governed in questions of set-off by principles similar to those which governed courts of law, \* went further than courts of law in applying those principles; admitting set-off in some cases where courts of law did not, and disallowing it in others where they did. (z)

The combined effect of the rules at law and in equity on the subject of set-off so far as it is necessary to allude to them in the present treatise was as follows :

1. Joint debts owing to and by the same persons in the same right could be set off both at law and in equity.

2. Separate debts owing to and by the same person in the same right could also be set off both at law and in equity.

3. Debts not owing to and by the same persons in the same right could not be set off either at law or in equity. But in considering whether debts were so owing, courts of law regarded the legal right, whilst courts of equity regarded the equitable right; and this led to the following amongst other important practical and different results.

If a covenant was entered into by one partner only, and he was sued on the covenant, he could at law set off a debt due from the plaintiff to himself alone; or if he sued on the covenant, a debt due from him alone could be set off against his demand. (a) But

(v) 2 Geo. 2, c. 22; and see 8 Geo. 2, c. 24, as to setting off simple contract debts against specialty debts.

(x) See *Castelli v. Boddington*, 1 E. & B. 66 at 879; *Attwooll v. Attwooll*, ib. 23; *Luckie v. Bushby*, 13 C. B. 864; and *Hutchinson v. Sydney*, 10 Ex. 438.

(y) See *Hutchinson v. Sturges*, Willes, 261; *Watts v. Rees*, 9 Ex. 696, and 11 ib. 410; *Mardall v. Thelusson*, 6 E. & B. 976. In *Pedder v. Mayor of Preston*, 12 C. B. N. S. 535, moneys belonging to a corporation, but raised for different purposes, and kept in its name at different accounts, were treated as

not belonging to it in different characters, so as to preclude it from setting off what was due from it to its bankers on one account against what was due to it by its bankers on the other accounts.

(z) See, generally, as to set-off in equity, *Rawson v. Samuel*, Cr. & Ph. 161; *Clark v. Cort*, ib. 154; *Freeman v. Lomas*, 9 Ha. 109. See, also, *Hunt v. Jessel*, 18 Beav. 100, as to set-off between creditors and trustees of creditors' deeds. See, also, *Agra & Masterman's Bank v. Hoffman*, 5 N. R. 214, *sed qu.* this case.

in equity this would not have been allowed if he was really suing or being sued as a trustee for the firm.

Again, if a surviving partner was sued at law for a non-partnership debt, he could set off a partnership debt owing by the plaintiff to him and his late co-partners (*b*)<sup>1</sup>; and in an action by a surviving partner for a debt due to himself separately, the defendant could set off a debt due to himself from the plaintiff and his late partners. (*c*)<sup>2</sup>

In equity, however, this could not have been done; for although, on the principle that a debt due from a firm is due from all the partners severally as well as jointly, a creditor of the firm was in equity regarded as a creditor of its deceased \*members, yet when a creditor of a firm sought to obtain payment of his debt out of the estate of a deceased partner, that creditor could not set off a debt due from him to the deceased on a separate account, but must pay this last debt in full, and then, as regards the debt in respect of which he sued, rank as any other creditor of the firm against the assets of the deceased. (*d*) It is obvious that if in such a case the two debts were set against each other, the separate creditors of the deceased would be paying a joint creditor of the firm, unless the assets of the deceased were sufficient to pay both classes of creditors in full.

On the other hand, debts which were really debts owing to and by a firm could be set off in equity although not at law. Thus in *Smith v. Parkes* (*e*) a firm of three partners covenanted to pay a certain sum of money to the defendant Parkes, who was indebted to the firm in certain other sums on another account. By the death of two of the members of the firm, the plaintiff Smith had become the sole surviving partner, and he was sued by Parkes on the covenant, and judgment was obtained. It

(a) See *Fletcher v. Dyche*, 2 T. R. 32.

(b) *Slipper v. Sidstone*, 5 T. R. 493; *Golding v. Vaughan*, 2 Chitty, 436.

<sup>1</sup>*Harris v. Pearce*, 5 Bradw. (Ill.) 622.

As to set-off between the surviving partner and the administrator of the deceased partner, see *Mack v. Woodruff*, 87 Ill. 570.

One of two partners assigned a mortgage to the other, and died. His administrator sued the survivor for the amount of the mortgage, on a bill by the sur-

vivor, stating that deceased was indebted to the firm more than the amount of the mortgage, and that it was agreed that it should be applied to the use of the firm, and that he had so applied it; the administrator was enjoined from proceeding in the suit. *Williams v. Stevens*, 5 N. J. Eq. 119.

(c) *French v. Andrade*, 6 T. R. 582.

<sup>2</sup>*Harris v. Pearce*, 5 Bradw. (Ill.) 622.

(d) *Addis v. Knight*, 2 Mer. 117.

(e) 16 Be. 115.

was held that, notwithstanding the judgment and its effect at law, Smith was entitled in equity to set off against the judgment debt the amount of what was due from Parkes to the late firm; and it was also held that Smith had this right not only as against Parkes, but also against persons to whom he had assigned the debt due to him.

4. Except under special circumstances, a debt due to or from

Setting off  
joint debts  
against separate,  
and *vice versa*.

several persons jointly could not be set off against a debt due from or to one of such persons separately. (*f*)<sup>1</sup>

This rule, which is really involved in the last, also

(*f*) See *Kinnerly v. Hosack*, 2 Taunt. 170; *Cheetham v. Crook*, McLel. & Y. 307; *Vulliamy v. Noble*, 3 Mer. 618; See, also, *Jebsen v. East and West India Dock Co.* L. R. 10, C. P. 300.

<sup>1</sup> The private debt of one co-partner cannot be set off against a co-partnership demand. *Powie v. Fletcher*, 2 Bay, 146; *Ladue v. Hart*, 4 Wend. 583.

The holder of a claim against an individual member of a firm, who purchases from such member what he knows to be partnership goods, cannot, in an action by the partners or their assignee for the amount of such goods, plead such claim either in payment or set-off against the partners, unless, by their assent, the co-partnership property was delivered in payment of the individual partner's debt. *Wise v. Copley*, 36 Ga. 508. See, also, *Warder v. Newdigate*, 11 B. Mon. 174; *ante*, 277, note.

Partners may set off claims held jointly, but not individually. *Sager v. Tupper*, 38 Mich. 259.

See, however, *Jones v. Jones*, 12 Ala. 244.

A member of a firm may, with the assent of his co-partners, set off, in an action against them individually, a debt due to the firm by the plaintiff in the action. Proof of the account and of the assent of partners to its use are all that is required; it is not necessary that the account should be assigned to the de-

fendant. *Montz v. Morris*, 89 Pa. St. 392.

According to the construction placed upon the statute of Alabama, allowing partners to be sued severally, it does not authorize a demand due by the firm to be set off against a separate debt due to one of the partners. *Hoyt v. Murphy*, 18 Ala. 316.

In an account between the administrator of a partner deceased, insolvent, and a surviving partner, the individual claim of the survivor against the deceased cannot be taken into the account and deducted from the balance in the survivor's hands. *Berry v. Powell*, 18 Ill. 98.

By operation of law a partnership debt is not extinguished or compensated by the indebtedness of the creditor to one of the partners; although such partner may, by way of defense or by exception, as it is termed in the practice of Louisiana, offset or oppose the compensation of his demand to that of the creditor. *Beauregard v. Case*, 91 U. S. 134.

Defendant purchased certain cattle of plaintiff, supposing that they were the property of E. and the plaintiff as co-partners. At the request of E. he subsequently took up a note signed by both E. and the plaintiff as makers, although in fact plaintiff was but a surety, as a matter of fact there was no co-partnership existing between E. and the plaintiff: *Held*, 1. That E. and the plain-

prevailed both at law and in equity (*g*), and was of great importance to partners. It scarcely requires to be pointed out that to allow a set-off of such debts would be to enable a creditor to obtain payment of what is due to him from persons in no way \*indebted to him. As a rule, therefore, a debt owing by one \*506 of the members of a firm could not be set off at law against a

tiff were not bound to join in an action for the purchase price of the cattle. 2. That the defendant should have made inquiry whether in fact the plaintiff was principal on the note. 3. That there being no partnership in fact, defendant could not set off his payment of the debt of E. against the claim of plaintiff. *Eux v. Hays*, 48 Iowa, 86.

It has been held that a defendant may set up in his defense, under the general issue, that the plaintiff is one of a partnership, and that the firm is indebted to him in a larger sum than that which the plaintiff demands, it being a part of the same transaction. *Buckingham v. Burgess*, 3 McLean, 364.

A, the partner of B, assigned all his interest in the partnership effects to B, with power to settle and compromise: *Held*, that B might set off a debt due to the firm against a debt due by himself alone. *Craig v. Henderson*, 2 Pa. St. 261.

Where one partner executed a bond in the name of the firm, under seal, for a debt due by the firm, in an action by the obligee on such bond: *Held*, that a debt due by the obligee to the firm was a good set-off, notwithstanding the plaintiff was allowed to enter a *nol. pros.* as to one of the firm, and proved that only the partner, retained as defendant, signed the instrument. *Sellers v. Streator*, 5 Jones L. 261.

The plaintiff, one partner of a firm, upon a dissolution thereof, sold all his interest in the property and debts due the firm to the defendant, the other partner; and the defendant gave the

plaintiff a promissory note and a bond of indemnity against the liabilities of the firm: *Held*, that the defendant could not set off against said note an account due from the plaintiff to the firm, at its dissolution. *Lesure v. Norris*, 11 Cush. 328.

Where a partner retired from the firm, and a new firm was formed, which undertook to pay the debts of the old firm, but failed, leaving debts of the old firm unpaid which the retiring partner had to pay: *Held*, that he might set off such payment against a bond which he had given to the new firm, and which they had assigned to A for value. *Hupp v. Hupp*, 6 Gratt. 310.

Action by two, as partners, for goods sold and delivered. The defendant showed that both had boarded together with him, and each had told him that "what one might call for would be the same as if both should order it," and filed his counter claim for liquors and cigars, furnished each while they were boarding with him, and it was allowed in defense, *pro tanto*. *Hartung v. Siccardi*, 3 E. D. Smith, 560.

In *Jones v. Blair*, 57 Ala. 457, the court disapproves the intimation in *Taylor v. Bass*, 5 Ala. 110, that the mere assent of the other partners, to the exclusive use and appropriation of a debt due the firm by one of the partners, may convert such debt into a proper subject of set-off by him, when sued alone on an individual liability.

(*g*) It cannot be done in equity even in cases of fraud, see *Middleton v. Pollock*, 20 Eq. 515.

debt owing to him and his co-partners (*h*): nor could a debt owing to one of the members of a firm be set off against a debt owing by him and his co-partners. (*i*) And this rule applied even where one partner only had been dealt with, and the debts sought to be set against each other were a debt owing by him, and a debt owing to him and others, but arising out of transactions with him alone.

This last point is well illustrated by *Gordon v. Ellis*. (*k*) There, an action was brought by three partners for the recovery from the defendant of money received by him for goods of the plaintiffs sold by the defendant on their account. The defendant pleaded in effect that he had been employed by A. only, that A. sent the goods for sale as if they were his own, and that the goods were sold by the defendant as A.'s goods, and that A. was indebted to the defendant in a larger amount than that sought to be recovered in the action. It was admitted that if B. and C. had by their conduct induced the defendant to believe that A. was the sole owner of the goods in question, and to deal with A. on that supposition, the defendant would have had a good defense to the action; but it was held that, as the defendant did not allege that such had been the case, his plea was a mere attempt to set off a debt due from one member of the firm against a debt due to the firm itself, and was bad.

In strict analogy to the rule which obtained at law, it has been decided in equity that if the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm on the partnership account, the bankers have no lien for such balance on what may be due from themselves to the members of the firm on their respective separate accounts; and that the debt due to the bankers from the partners jointly cannot be set off against the debts due from the bankers to the partners separately. (*l*)

The Judicature acts have extended the equitable principles of set-off to all actions in the High Court (*m*); and notwithstanding the rules relating to joint and to several

(*h*) *Gordon v. Ellis*, 2 C. B. 821; *France v. White*, 8 Scott, 257.

(*i*) *Arnold v. Bainbridge*, 9 Ex. 153; *McGillivray v. Simson*, 2 Car. & P. 320; *Boswell v. Smith*, 6 C. & P. 60.

(*k*) 2 C. B. 821; and see the same case.

7 Man. & Gr. 607, where it will be observed the plea was materially different.

(*l*) See *Watts v. Christie*, 11 Beav. 546; *Cavendish v. Geaves*, 24 ib. 173.

(*m*) See §§ 24 and 25 of the Judicature act, 1873.

claims (*n*), it is apprehended that the old rule precluding the set-off of a joint against a separate debt, or *vice versâ*, is still in force. (*o*)

To the general rule which precludes the set-off of a debt due to a firm against a debt owing by one of its members, and *vice versâ*, there are, however, a few exceptions. Exceptions to general rule.

If it can be shown that all parties concerned have expressly or impliedly agreed that a debt owing by one of them only shall be set off against a debt owing to them all 1. Agreement. or *vice versâ*, effect will be given to that agreement, and the application of the general doctrine in question will thereby be precluded. Regard, therefore, must be had to any agreement which the parties themselves may have come to, and to their course of dealing with each other. (*p*)

So if a joint and several promissory note is made by partners, and one of them sues the payee for some separate demand, the defendant can set off the note; for, *ex hypothesi*, it is the several note of the partner suing him. (*q*)

An agreement by one partner that a debt due from himself separately shall be set off against a debt due to him and his co-partners jointly is *primâ facie* a fraud on them; and a set-off founded on such an agreement cannot, it is apprehended, be maintained in the absence of special circumstances, rendering such an agreement binding on the other partners. (*r*)

\* Another exception occurs where one partner has been allowed by his co-partners to act as if he were a principal and not an agent of the firm. \*508

It has been seen that dormant partners may join their co-partners in suing on contracts entered into in form with the latter only. But dormant partners cannot, by coming forward and suing on such contracts, deprive the defendant of any right of set-off of which he might have availed himself if the non-

(*n*) Ord. xvi. rr. 1, 3, 5, *ante*. p. 484.

(*o*) However, in *Manchester, Sheffield & Linc. Rail. Co. v. Brooks*, 2 Ex. D. 243, a separate debt was allowed to be pleaded by way of set-off to an action for a joint debt. This can hardly have been right.

(*p*) See *Vulliamy v. Noble*, 3 Mer. 593; *Dowman v. Matthews*, Prec. in Ch. 580; *Cheetham v. Crook*, McLel. & Y.

307; *Kinnerly v. Hosack*, 2 Taunt. 170.

(*q*) See *Owen v. Wilkinson*, 5 C. B. N. S. 526.

(*r*) *Wallace v. Kelsall*, 7 M. & W. 264, is the other way, but is to be explained by the old technical rules of pleading, which are now abolished; see *ante*, p. 471; *Piercy v. Fynney*, 12 Eq. 69; *Nottidge v. Pritchard*, 2 Cl. & Fin. 379.

dormant partners only had been plaintiffs. This was held by Lord Kenyon in *Stracey v. Decy* (*s*), where the plaintiffs *Stracey v. Decy*. Stracey, Ross and others, were in partnership as grocers, and Ross was the only person who appeared to the public as concerned in the partnership business. The defendant had dealt with Ross, and had become indebted for grocery supplied by him. On the other hand, the defendant had expended money for Ross, and had done so on the supposition that the monies thus expended could be set off against what was due for the grocery. The plaintiffs, however, contended that this set-off could not be made; but Lord Kenyon held that as the defendant had a good defense by way of set-off against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the defendant the same advantages and equities in his defense as he would have had in an action brought by Ross solely. (*t*) In this case, all the partners except Ross were dormant, and by the terms of the agreement into which all had entered, Ross alone was to be the apparent trader. His co-partners were therefore simply in the position of undisclosed principals, and were treated accordingly by the Court.

In *Gordon v. Ellis* (*u*), which has been before referred to, an attempt was made to extend the principle on which Lord Kenyon decided *Stracey v. Decy*, to all cases *Cases where one partner only has been dealt with.* \*509 in which one \*partner only transacts the business of the firm, and becomes himself indebted to the person with whom he deals. But it was held, and it is conceived rightly, that a person liable to be sued by a firm cannot set off a debt due from one only of its members, on the ground that he only was dealt with by the defendant, unless it can be shown that the other members of the firm induced the defendant by their conduct to treat their co-partner as the only person with whom the defendant had to do. (*x*)<sup>1</sup>

(*s*) 7 T. R. 361, note, and 2 Esp. 469. See, too, *Teed v. Elworthy*, 14 East, 213, and *De Mautort v. Saunders*, 1 B. & Ad. 398, overruling *Dubois v. Ludert*, 5 Taunt. 609.

(*t*) See *George v. Clagett*, 7 T. R. 359; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

(*u*) 2 C. B. 821, *ante*, p. 506.

(*x*) See *Ramazotti v. Bowring*, 7 C. B. N. S. 851; *Bonfield v. Smith*, 12 M. & W. 405; *ante*, p. 482; and *Baring v. Corrie*, 2 B. & A. 137.

<sup>1</sup> Where an action is brought by one of two partners of a law firm for business which has uniformly been done in

But here again it is to be observed, that if the debt due from one partner can be treated as due from the firm, that debt may be set off against another debt due to it. This is illustrated by the same case of *Gordon v. Ellis* (*y*), where in an action by a firm for money due to it from the defendant for goods of the firm sold by him, the latter was held entitled to set off a debt due to him for an advance made by him to one of the partners on account of those goods. The Court thought that although the money was advanced to one partner only, the defendant had a right to treat it as an advance to the firm made on that partner's requisition, whilst acting within the scope of his apparent authority as agent of the firm. In point of fact, the defendant, instead of waiting until he had sold the goods, and then handing over the money produced by their sale, made a payment on account; and he sought nothing more than to have the amount so prepaid deducted from the sum for which he sold the goods.

*Gordon v. Ellis.*

It sometimes happens that in order to avoid a defense of set-off, a plaintiff who is indebted to a firm sues one of its members alone for a debt owing to the plaintiff by the firm. In such a case, the defendant may require his co-partners to be joined. (*z*) Again, if a firm holds the note of a person to whom it is itself indebted, and in order to deprive him of his right of set-off, indorses the note to one of its members, and he alone sues on \*it, a defense disclosing the facts and setting off the debt owing to the defendant by the firm will be good. (*a*)

Attempt to avoid set-off by suing one partner.

The provision of the Judicature acts relating to the assignment of debts (*ante*, p. 487) has greatly facilitated defenses by way of set-off where there has been a change in a firm. The principles applicable to such cases are well illustrated by the following decision.

Set-off where there has been an assignment.

In *Cavendish v. Geaves* (*b*), the plaintiff was indebted on bonds to a firm of bankers. Many changes in the firm took place, and the bonds in question were on each change

*Cavendish v. Geaves.*

the name of the party suing, a set-off will be allowed of a demand against the firm. *Platt v. Halen*, 23 Wend. 456.

(*y*) 7 Man. & Gr. 607.

(*z*) Ord. xvi. r. 13. But see 23 & 24 Vict. c. 126, § 20, as to the necessity of

so doing; the old practice was to plead in abatement. See *Stackwood v. Dunn*, 3 Q. B. 823, and *Bonfield v. Smith*, 12 M. & W. 405.

(*a*) *Puller v. Roe*, 1 Peake, N. P. 260.

(*b*) 24 Beav. 163. See, also, *Jefferys v. Agra and Masterman's Bank*, 2 Eq.

assigned by the old to the new firm. The plaintiff had an account with the bank as one of its customers, and when the bank stopped payment a balance was owing to him on that account; but the bonds had been previously assigned to third parties, without notice however to the plaintiff. The question then arose, whether, notwithstanding the various changes in the firm, and the assignment of the bonds, the plaintiff was entitled to set-off against the debt due from him on the bonds, the amount due to him as a customer of the bank, and it was held that he was. The judgment in this case is peculiarly instructive, and the following extract from it is submitted to the reader without apology.

“If a customer borrow money from his bankers and give land to secure it, and afterwards on the balance of his general banking account, a balance is due to the customer from the same bankers who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity.

“If the firm were altered and the bond assigned by the original obligees to the new firm, and notice of that assignment were given to the debtor, and if after this a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the chose in action would be inoperative at law, and the obligees of the bond, and the debtor on the general account would be different persons; but as in equity the persons entitled to the bond, and the debtors on the general account, would be the same persons, a right to set-off would exist in this Court, and the customer would in equity be entitled to set off the balance due to him against the bond debt due from him.

\*511 \* “If after the bond had been given it had been assigned to strangers, and no notice of the assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of the firm, then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also if the matter on account were brought here, as the assignees of the chose in action would be bound by the equities affecting their assignors.

“But if notice of the assignment had been given to the original debtor, no right of set-off would exist in this court for the balance subsequently due by the bankers to the obligor; because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account, with whom he had continued to deal.

“If the assignment of the bond had been made to the new firm with notice to the obligor they would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees.

“If, after the alteration of the firm, and after the assignment of the bond to

674; and as to set-off at law as against assignment, *Watson v. Mid-Wales Rail. Co. L. R. 2 C. P. 593.* \*

the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would in equity be bound by it, because, as I have stated, the assignees of the bond take it subject to all the equities which affect the assignors."

The court, after laying down these general propositions, came to the conclusion on the evidence in the case, that the plaintiff was informed that the successive firms with which he dealt as customers, were his creditors in respect of the bonds, but that he had no notice of their assignment by the firm which stopped payment to the holders of them, and that therefore he was entitled, even as against such holders, to set off what was due to him as a customer of the bank when it stopped payment.

The above decisions are sufficient to show that in allowing debts to be set off against each other, courts of equity went far beyond courts of law, although they did not introduce any new principle of set-off. The truth of this was still more apparent from the cases in which set-off was not allowed, one of the debts being joint and the other several only.

## 2. *Of set-off by and against companies.*

In actions between companies on the one hand and non-members on the other, there is little to be said upon the subject of set-off, except that the ordinary rules Set-off when a company sues a member. are applicable.

\*It is only when a company sues, or is sued by, one of its \*512 own members, or by some person claiming under him, or when one member of a company, having obtained judgment against it, seeks to enforce such judgment against a co-member, or when a company is being wound up, that questions of set-off present peculiar difficulties. These are matters, however, which will be more conveniently discussed hereafter, and the only observation which requires to be made here is, that in actions between a company on the one hand and one of its own members on the other, the member is so far treated as a stranger to the company, that cross debts existing between him and the company may be set off against each other (c), but that cross demands between himself and other members individually cannot be gone into. As regards incorporated companies, this follows from the circumstance that

they are distinct from the members composing them; and as regards unincorporated companies, it follows from the doctrine that a debt due from or to several persons jointly cannot be set off against a debt due to or from some or one of them only.

Moreover, if a member of an unincorporated joint-stock company is a creditor of the company, and is in a position to sue the other members or any of them, it is no defense that if the company were wound up, and its accounts taken, the plaintiff would be found indebted to the company as a shareholder thereof. In such a case as that now supposed, the plaintiff sues as a non-member; and if his demand is one capable of being enforced, he will not be prevented from enforcing it, simply because in his character of member he is indebted to his co-shareholders. This is well illustrated by a case before Lord Cottenham, which may be conveniently noticed here, although it will have to be referred to again in connection with another subject. In the case in question, *Rheam v. Smith* (d),

*Rheam v.  
Smith.*

the plaintiff and one of the defendants were members of an unincorporated joint-stock company; the defendants were the bankers of the company, and had sued the plaintiff for a debt due by the company to the defendants as bankers. The plaintiff thereupon filed a bill against the bankers and the company, upon the ground that he ought not, \*513 \*as between himself and the bankers (one of whom was a shareholder), to pay more than what, on taking the accounts of the company, would be found to be due from the plaintiff in respect of the debt in question. The bill accordingly prayed that the accounts of the company might be taken, and its affairs wound up, and that provision might be made for due payment of the debts of the company, and that in the meantime the action, and all proceedings therein, might be stayed. A demurrer to the bill was overruled by the Vice-Chancellor, who, it is said, treated the case as one in which a partnership of A. and B. was suing a partnership of A., C., and D., in which case it would be contrary to equity to allow the debt to be recovered without first ascertaining for what proportion of it A. was himself liable. (e) But on appeal to the Lord Chancellor, the decision below was

(d) 2 Ph. 726.

(e) The fact that such an action could not be maintained at law, is not noticed

in the report. But it is clear that although one partner might under certain circumstances sue another at law, A.

reversed, and the demurrer was allowed; the Lord Chancellor observing,—

“ It really seems to me that, if the principle on which this demurrer is said to have been overruled by the Vice-Chancellor were admitted, it would lead to the most frightful consequences; for it comes to this, that if a railway company, or any company carrying on great works, and who may have become indebted to some contractor in half-a-million of money for work done, upon that contractor applying for payment of his debt, can find out that he, or any one connected with him in business, holds a single share in the company, they may say, No. we cannot pay our debt; you must first break up the company, and ascertain whether its assets are sufficient for the payment of its debts, for if not, you or the persons connected with you will be liable to contribute to the very sum which you seek to recover. It is impossible to stop short of that if the principle be once admitted. After some difficulty a rule has been established at law, enabling creditors of these great companies to enforce their claims against individual shareholders, leaving them, of course to their right to contribution against their co-partners. The rule, no doubt, leads sometimes to hardship upon the party sued, but the balance of convenience is in its favour, and for that reason it has been adopted: because it would be a still greater hardship upon parties dealing with such companies, if the enforcement of their claims were to be embarrassed by the necessity of treating all the members of the company as jointly responsible. This suit, however, is an attempt to induce a court of equity to interfere with that rule for the plaintiff, by his bill, asserts in effect nothing short of this proposition:—If I can find \*out that you who \*514 are suing me at law have a single share in the company against whom the claim is made, then there is an end to your legal right; equity will interfere, and though your money may have contributed to the establishment of the company, you shall not be permitted to recover a single farthing against any member of the company until the concern is altogether wound up.”

It must not, however, be inferred from this case, that if a member of a company has a demand against it, and seeks to enforce that demand against some member of it, he may not be met by some defense based on the rights of the members *inter se*. This subject will be examined in the third book, when the rights of partners *inter se* are discussed. (*f*)

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The general rule that an assignee of a debt is in no better position than his assignor, is undoubted; and, as a general rule, where a debt due from a company is assigned, the assignment cannot defeat the right of the company to set off against

Set-off against  
holders of  
securities.

and B. could not possibly have sued A.  
& C.

(*f*) See *Woodhams v. Anglo-Australian Co.* 2 DeG. J. & Sm. 162.

the assignor, and also against the assignee, what may be due from the assignor to the company before the company has notice of the assignment, and when payment by the company is demanded. (*g*) At the same time, it is possible for a company to deprive itself of this right of set-off; and if, being indebted, it gives to its creditor a document which shows that the debt is to be paid without reference to the state of other accounts which may exist between him and the company, the company cannot, when sued for such debt, set off demands which it may have against him for other matters. The decisions on this subject will however be more conveniently referred to hereafter. (*h*)

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\*515 \*SECTION IV.—OF EXECUTIONS AGAINST PARTNERSHIPS AND COMPANIES AND THEIR MEMBERS FOR THE DEBTS THEREOF.

After a creditor of a partnership or company has succeeded in establishing his demand, and has obtained judgment, Execution. it may become necessary for him to take further proceedings to enforce that judgment before he can obtain actual payment. These proceedings are very different when judgment has been obtained against a company, from what they are when judgment has been obtained against the members of an ordinary partnership; although now a judgment may be entered up against partners in their mercantile name. (*i*)

### 1. EXECUTION AGAINST PARTNERS.

If a judgment has been obtained against several persons sued jointly, the writ of execution founded on the judgment Execution against partners. must be against all of them, and not against some or one of them only; for the judgment does not warrant such a writ. (*k*) But, although the writ of execution on a joint judgment

(*g*) Ashworth's case, 10 W. R. 771, 593.

V.-C. W.; and see *Athenæum Life Assurance Society v. Pooley*, 1 Giff. 102, and 3 DeG. & J. 294. See, also, *Watkins v. Clark*, 12 C. B. N. S. 277; *Watson v. Mid Wales Rail. Co.* L. R. 2 C.

(*h*) See *infra*, book iv. c. 3, div. 1, § 9, and *Aslatt v. Farquharson*, 10 W. R. 458.

(*i*) Ord. xlii. r. 8, set out below.

(*k*) See *Penoyer v. Brace*, 1 Lord

must be joint in form, it may be *levied* upon all or any one or more of the persons named in it; for each is liable to the judgment creditor for the whole, and not for a proportionate part of the sum for which judgment is obtained. (b)<sup>1</sup> The consequence of this is that

Raymond, 244; *Clarke v. Clement*, 6 T. R. 526; 2 Wms. Saund. 72 l; Bac. Ab. Exec. G. 1.

(b) See *per DeGrey, C. J.*, in *Abbot v. Smith*, 2 Wm. Blacks. 949; and *Herries v. Jamieson*, 5 T. R. 556, *per Lord Kenyon*.

<sup>1</sup> See *Foster v. Barnes*, 81 Penn. St. 377; *Randolph v. Daly*, 15 N. J. Eq. 313.

So long as the legal title of the partnership property remains in the co-partners, a creditor of the firm may pursue his remedy against it, in an action at law, in the same manner as against an individual debtor. But if the legal title has been conveyed to a third person *bond fide*, the creditor can pursue the property only by a bill in equity to marshal the assets and enforce his equitable lien. *Stokes v. Stevens*, 40 Cal. 391.

Judgment was obtained and execution issued against an individual doing business in his own name, but who had at the time a secret partner; afterwards, a judgment was obtained and an execution issued against both partners: *Held*, that the property of the partnership was liable to pay both debts, but that the creditor whose execution was first in the hands of the sheriff had priority. *Brown's appeal*, 17 Pa. St. 480.

A judgment was recovered against a partnership on confession of one of the partners. Execution was issued thereon, and the partners paid the amount to the sheriff after a levy on partnership property. Afterwards, the judgment was reversed as to the party who was not a party to it: *Held*, that the plaintiff in execution was entitled to recover of the sheriff the amount received

by him on the execution. *Harper v. Fox*, 7 Watts & S. 142.

S. and T., trading as partners, made several assignments, each of his private property and interest in the firm, on successive days, to the same assignees, who accepted both trusts. Afterward a firm creditor issued execution and levied upon the partnership property: *Held*, that, in the absence of proof to the contrary, the assignment of the firm property to assignees by one of the firm was assented to by the other, and that the partnership property vested in the assignees, and could not be levied upon by the sheriff, after the assignments had been made and accepted. *McNutt v. Strayhorn*, 39 Pa. St. 269.

The mere insolvency of a partnership does not, of itself, work such a legal or equitable appropriation of its effects, in the absence of any proceedings for a *pro rata* distribution, as to prevent a judgment creditor from making his debt out of the effects by execution, or to prevent him from removing fraudulent obstructions or assignments intended by the debtor to hinder the execution. *Greene v. Breck*, 32 Barb. 73.

A, residing in the country, and B in the city of New York, both produce dealers, made an arrangement by which they carried on their business in connection, the profits at both places to be divided between them, intentionally concealing the arrangement made. B incurred a debt to C in the course of his business, confessed a judgment, and the execution was levied on the property used in the business carried on by B. A claimed the property as partnership property: *Held*, that the levy was just and legal, the creditor C having a right to look to the property of A to pay his

the sheriff may execute a writ issued against several partners jointly, either on their joint property, *or* on the separate property of any one or more of them, *or* both on their joint and on their respective separate properties; and so long as there is, within the sheriff's bailiwick, any property of the partners, or any of them, a return of *nulla bona* is improper. (*m*) Of course, if the judgment creditor has had execution and satisfaction against one of the part-

ners, he cannot afterwards go against any of the others (*n*);

\*516 but the \*important point to observe is, that the sheriff is not bound to levy on the goods of the firm before having recourse to the separate properties of its members, and that they cannot require the sheriff to execute the writ in one way rather than another.

Similar rules are applicable to attachments of debts under the Common law procedure act, 1854 (17 & 18 Vict. c. 125, § 61), it having been determined that a judgment creditor of three persons

debt. *Van Valen v. Russell*, 13 Barb. 590.

M. and K., in their articles of partnership, agreed that K should furnish at first all the necessary capital, and have the exclusive ownership of it, until M. should contribute certain sums as agreed on. Before M. had contributed any funds, T. obtained a judgment against K., which was levied on the whole property constituting the capital stock; and afterward the York County Bank obtained a judgment against M. & Co., which was levied on the same property. The property was sold for less than T.'s debt, and the money paid into court for distribution: *Held*, that T. was entitled to the whole of it. Appeal of York County Bank, 32 Pa. St. 446.

Where, by articles of dissolution of a partnership between A and B, A took the property of the partnership, and agreed to pay the debts of the firm, and a creditor of the partnership having obtained a judgment against the firm for a debt, levied his execution upon the real and personal estate of both A and B, and afterward assigned the judg-

ment to C, the father-in-law of A, and A afterward sold his personal estate so levied on, to D, and C, by writing under seal, released his interest therein to D, with full knowledge of the terms of dissolution: *Held*, that the judgment could not be enforced against B. *Bell v. Hall*, 5 N. J. Eq. 477.

A judgment obtained by one firm against another, each of which is constituted in part of members belonging to both firms, thus being both plaintiff and defendant, cannot be executed by a levy upon the separate property of an individual member of the defendant firm. *Tassey v. Church*, 6 Watts & S. 465.

An attorney holding moneys belonging to a late firm of three persons is chargeable on trustee process in a suit against a new firm comprising two members of the old firm and another person, unless some interposing claim be made by the creditors of the old firm. *Burnell v. Weld*, 59 Me. 423.

(*m*) See *Jones v. Clayton*, 4 M. & S. 349.

(*n*) See *Com. Dig. Execution, H*.

can, under the act in question, attach debts owing to any one or more of his judgment debtors. (*o*)

The extent to which the right to levy execution against the effects of a firm is affected by bankruptcy will be examined hereafter.

The procedure on a judgment against a firm is regulated by Order XLII., Rule 8, which is as follows:—

Where a judgment is against partners in the name of the firm, execution may issue:—

- |  |  |
|--|--|
| (a) Against any property of the partners as such.  | Execution<br>against part-<br>ners on judg-<br>ment against<br>firm. |
| (b) Against any person who has admitted on the pleadings that he is or has been adjudged to be a partner.  |  |
| (c) Against any person who has been served as a partner with the writ of summons and has failed to appear. |  |

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the court or a judge for leave to do so; and the court or a judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

It is not clearly said in this rule that execution must first be levied against the joint estate of the firm before having recourse to the separate estates of the members; and, having regard to the previous well-established practice, the rule would probably be construed as not rendering such a course necessary. Such a construction of the rule, or a new rule to this effect, would, however, be eminently just; and would be strictly analogous to the course adopted by the legislature respecting the issue of execution against a shareholder on a judgment against a company governed by the Companies clauses consolidation act. (*p*)

\*The mode of taking in execution the share of one partner \*517 on a separate judgment against him will be examined hereafter (see Bk. III. c. 5, § 4).

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## 2. EXECUTION AGAINST COMPANIES AND THEIR SHAREHOLDERS.

By the law of this country, a judgment against an incorporated company cannot by common law be executed except against the property of the company; and a judgment

Judgments  
against com-  
panies.

(*o*) *Miller v. Mynn*, 1 E. & E. 1075.

(*p*) See *infra*.

against an individual cannot by common law be executed against any person or property, except the person or property of the individual named in the judgment. In order, however, to give creditors a more extensive remedy than they would have at common law upon a judgment obtained against companies, either in their corporate names or in the names of their public officers, the legislature has rendered such judgments enforceable against the individual members of the companies. For this purpose three schemes have been had recourse to.

The first in point of time was applicable to companies empowered to sue and be sued, and was as follows:—A creditor having obtained judgment against the public officer, was allowed to proceed upon that judgment by *scire facias* against any of the shareholders in the company at the time the judgment was obtained; and, if necessary, also against such of the late shareholders as were members of the company when the debt was contracted.

Modes of executing such judgments against the members.

First mode.

The next device was a mere modification of the last, and consisted in the application of it to judgments against companies by their corporate names, which judgments were made enforceable against shareholders and former shareholders in substantially the same manner as that above explained: a qualification, however, was added, to the effect that recourse should not be had against individual shareholders until efforts had been made in vain to obtain payment from the company, and as to some companies, that recourse should not be had against any shareholder except to the extent of his shares.

Second mode.

The third and last device was altogether different, and was the result of the course adopted by creditors, who, when they could not obtain satisfaction from companies, singled out some \*unfortunate shareholder, and compelled him to pay the whole amount for which judgment had been recovered. This course was in the highest degree cruel; and Parliament was induced, when legislating on joint-stock companies, in 1856, to leave out all those clauses, found in the preceding acts, enabling creditors to execute judgments against individual shareholders, and to provide, instead, that creditors should have the power, upon non-payment of the debts due to them from the company, to cause it to be wound up. The same view prevailed when the acts relating to joint-stock companies

Third mode.

\*518

were remodeled in 1862. Consequently, a creditor of a company registered under the Companies act, 1862, can only execute a judgment obtained against the company by proceeding against the corporate property, and, if necessary, by having recourse to a petition for winding up the company.

Such is a general outline of the manner in which a creditor of a company has been enabled to obtain satisfaction of a judgment recovered against it. To fill up this outline so far as is possible, without alluding to repealed statutes and to the winding up of companies, is the object of the remainder of the present section.

*First, as to execution against the company.*

A judgment against a corporation is executed against the corporate property in the same way as a judgment against an individual is executed against his property (*q*); and a judgment against a public officer may, it is conceived, be executed against him and his property as if he were an ordinary individual, where the right of the judgment creditor is not in this respect modified by statute. (*r*)

A corporation cannot be attached for contempt or for disobedience to an order made upon it. (*s*) But if an order is \*made upon a corporation and its directors or officers set the order at defiance, an attachment against them personally will, if necessary, be granted. (*t*)

By the Common law procedure act, 1860 (23 & 24 Vict. c. 126, § 33), it is enacted that:—

“Writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof, as in the case of mandamus, or by writ of sequestration against their property and effects to be issued in such form, and tested and returnable in like

Execution  
against cor-  
poration.

\*519 Attachments.

Executions  
against com-  
panies.  
Attachments.

(*q*) The rolling stock and plant of railway companies are protected by 30 & 31 Vict. c. 127, § 4, made perpetual by 38 & 39 Vict. c. 31.

(*r*) See *Harrison v. Timmins*, 4 M. & W. 510; *Wormwell v. Hailstone*, 6 Bing. 668, where the nominal defendant was held not liable to execution; and *Corpe v. Glyn*, 3 B. & Ad. 801, where he was held not liable to an at-

tachment. See *infra*, as to particular companies.

(*s*) Hence an award against a corporation cannot be enforced by attachment, *Mackenzie v. Sligo and Shannon Rail. Co.* 9 C. B. 250.

(*t*) *Lacharme v. Quartz Rock Mining Co.* 1 H. & C. 134, and see *Salman v. Hamburg Co.* 1 Ch. Ca. 204.

manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration, out of the Court of Chancery." (u)

Acts of Parliament are sometimes met with which empower a company to sue and be sued by a public officer, but which, instead of giving any remedy against him or the other shareholders individually, render the funds of the company alone liable to its creditors. In such a case no execution against the public officer of the company, or against any of its shareholders, can be issued (x); but an action against the public officer will nevertheless lie, even although there may be no funds, and the plaintiff may consequently have no means of enforcing his judgment after he has obtained it. (y) If there are funds they can be got at; but before the Judicature act it was said that the only mode in which a creditor could get at them was by *mandamus*, or by a bill in equity. (z)

Even before the Common law procedure act of 1854, the 68th section of which considerably extends the power of courts of law to grant a *mandamus* (a), it had been held that a creditor of a company, who by virtue of its act of Parliament had no remedy against its shareholders, but only against the funds of the company, was entitled to a *mandamus* to its treasurer and directors, after establishing his debt in an action. (b) If there are no funds, and the company is not under an obligation to provide any, no *mandamus* can be granted. (c); but if the company is under an obligation to provide funds, and it will take no measures to raise them, it seems that a *mandamus* will go. (d) It is, however, to be observed that a writ of *mandamus* will not be granted if the only reason why payment cannot be obtained by execution in the ordinary way, is, that there is nothing to seize. (e)

(u) See on this section, Day's Com. Law Proc. Acts.

(x) See Harrison v. Timmins, 4 M. & W. 510; Wormwell v. Hailstone, 6 Bing. 668; Corpe v. Glyn, 3 B. & Ad. 801.

(y) See Kendall v. King, 17 C. B. 483.

(z) See the cases in the last two notes. Actions have been brought in such cases as in Cane v. Chapman, 5 A. & E. 647; but see Addison v. The Mayor of Preston, 12 C. B. 108.

(a) See Norris v. The Irish Land Co. 8 E. & B. 512, correcting Benson v. Paull, 6 E. & B. 273.

(b) See Corpe v. Glyn, 3 B. & Ad. 801; R. v. St. Katherine Dock Co. 4 ib. 360.

(c) R. v. The Victoria Park Co. 1 Q. B. 288.

(d) Ib.; and see 17 & 18 Vict. c. 125, § 68.

(e) See R. v. The Victoria Park Co. 1 Q. B. 288.

The effect of winding up a company upon executions against it will be examined hereafter in the Fourth Book.

*Secondly, as to proceedings against shareholders upon a judgment obtained against a company or its public officer.*

By the common law, a judgment against A. cannot be executed against B. without a *scire facias*, which, though a judicial writ, is in the nature of an action, and may be pleaded to accordingly. So, before a judgment in the Chancery division against a public officer can be enforced against individual shareholders, an order against them personally must be obtained. (*f*) The object of the *sci. fa.* is technically to make the execution conformable to the judgment; but substantially its object is to give the person against whom the judgment is sought to be enforced an opportunity of defending himself; for, *ex hypothesi*, he has not had that opportunity before. (*g*)

*Sci. fa. against shareholders.*

*Judgment in the Chancery Division.*

In those cases in which a judgment against a company or a public officer can be enforced against a shareholder, a *scire facias* is a necessary preliminary, unless there is some statutory enactment to the contrary (*h*), and a provision that execution \*shall not issue without leave obtained by motion \*521 in open court, is not sufficient to dispense with a *sci. fa.* (*i*)

*Necessity of sci. fa.*

It has been decided that a *sci. fa.* is necessary in the case of banking companies governed by 7 Geo. 4, c. 46 (*k*), and of companies governed by the Companies clauses consolidation act. (*l*)

*Sci. fa. under 7 G. 4, c. 46, and 8 & 9 Vict. c. 16.*

The same rule would probably be held to apply to companies governed by the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73.

*Under 7 Wm. 4 & 1 Vict. c. 73.*

(*f*) *Vigers v. Pike*, 8 Cl. & Fin. 652; *Healey v. Chichester and Midhurst Rail. Co.* 9 Eq. 148.

L. J. N. S. 102, Q. B.

(*g*) See, generally, as to *sci. fa.* Com. Dig. Pleader, 3 L.; Bac. Ab. *Sci. fa.* and the note to *Underhill v. Devereux*, 2 Wms. Saund. 71.

(*i*) See the last three cases. A judgment obtained in a colony may be sued upon in this country in an action in the ordinary form: *Bank of Australia v. Nias*, 16 Q. B. 717.

(*k*) *Ransford v. Bosanquet*, 2 Q. B. 972.

(*h*) *Bartlett v. Pentland*, 1 B. & Ad. 704; *Clowes v. Brettell*, 10 M. & W. 506; *Winfield v. Barton*, 2 Dowl. N. S. 355, and 7 Jur. 258; *Wingfield v. Peel*, 12

(*l*) 8 & 9 Vict. c. 16, § 36; *Hitchins v. The Kilkenny Rail. Co.* 10 C. B. 160; *Devereux v. The Kilkenny Rail. Co.* 5

Under the repealed acts 7 & 8 Vict. cc. 110 and 113, leave to issue execution against a shareholder might be obtained without any suggestion or *sci. fa.* But this did not render a *sci. fa.* improper; and in point of fact it was very commonly had recourse to for the purpose of executing judgments obtained against companies to which these acts applied. (*m*) A *sci. fa.*, however, did not lie against the executors of a deceased shareholder. (*n*.)

The Companies act, 1862, as has been already observed, does not give a judgment creditor of a company formed under it any remedy against shareholders, except by winding up the company.

If a company is incorporated, or if it must be sued by a public officer, a creditor cannot proceed by action against a shareholder; but must obtain judgment against the company and then proceed upon that judgment. (*o*) It seems to be \*doubtful, whether a county court judgment against a company can be executed against its shareholders; hence the prudence of suing companies in one of the superior courts. (*p*)

A judgment against a company or its public officer may be registered like any other judgment; and in those cases in which it is equivalent to a judgment against all the members of the company individually, and is enforceable against them by execution, it has been supposed to affect them as if it had been in form a judgment against them individually and registered accordingly. (*q*) But against this opinion it may most reasonably be urged that as a judgment against a company or its public officer cannot be executed against an individual shareholder of a company without a *sci. fa.*, it is absurd to make

Ex. 834. See, as to enforcing decrees in equity, *Healey v. Chichester and Midhurst Rail. Co.* 9 Eq. 143.

(*m*) See as to 7 & 8 Vict. c. 110, *Palmer v. The Justice Assurance Society*, 6 E. & B. 1015; *Peart v. The Universal Salvage Co.* 6 C. B. 478; *Thompson v. The Universal Salvage Co.* 3 Ex. 310; *Re Weiss*, 15 C. B. 331. And as to 7 & 8 Vict. c. 113, see *Bendy v. Harding*, 1 C. B. N. S. 551; *Thompson v. Harding*, ib. 555; *Dossett v. Harding*, ib.

524; *Morisse v. The Royal British Bank*, 1 C. B. N. S. 67; *Wilde v. Stannar*, 1 H. & N. 873. See, too, *Powis v. Butler*, 3 C. B. N. S. 645, and 4 ib. 469; *Fry v. Russell*, 3 ib. 665.

(*n*) *Powis v. Butler*, *ubi supra*.

(*o*) *Fell v. Burchett*, 7 E. & B. 537; and see as to public officers, *ante*, p. 495.

(*p*) See *Taylor v. The Crowland Gas Co.* 11 Ex. 1.

(*q*) See *Ex parte Ness*, 5 C. B. 155.

that judgment a charge on his property before execution against him can lawfully be sued out. (*r*) The writer takes it to be clear that a judgment registered against a company governed by the act of 1862 does not affect the property of its members.

In order to enable a creditor who has obtained judgment against a company to discover the persons against whom such judgment may be executed, provision has been made Discovery of shareholders. by the various statutes relating to companies, compelling them to make periodical returns, or to keep registers, of the names and residences of their shareholders, and directing such returns or registers to be open for inspection. (*s*)

A creditor who has obtained judgment against a company, \*and is in a position lawfully to \*523 execute such judgment against the individual members of that company, cannot be restrained from proceeding to execute it against any member or members he may choose to select, provided he acts *bonâ fide* for the purpose of obtaining payment of what is due to him. (*t*) But, as will be seen hereafter, neither a judgment creditor, nor a purchaser from him, will be allowed to use the judgment for the dishonest purpose of aiding some members of the company against the others. (*u*) Right of creditor to proceed against individual shareholder.

The effect of winding up proceedings on executions against members of companies will be noticed in the Fourth Book.

Having made these preliminary remarks on the subject of execu-

(*r*) See *Harris v. The Royal British Bank*, 2 H. & N. 535. It has been held in Ireland that a judgment obtained against a company ought not to be registered against a former shareholder. See *Hone v. O'Flahertie*, 9 Ir. Ch. 119, where relief against such registration was given. See, also, *Ex parte Thornton*, 2 Ch. 171, as to registering winding-up orders under § 114 of the Companies act, 1862, now repealed.

(*s*) See 7 Geo. 4, c. 46, § 4, *et seq.*; 7 Wm. 4 & 1 Vict. c. 78, § 6, *et seq.*; 8 & 9 Vict. c. 16, §§ 9, 10, 36; and as to the mode of obtaining inspection, see *Meador v. I. of Wight Ferry Co.* 9 W. R. 750, Ex., where a mandamus was held not necessary; *R. v. The Derbyshire Rail-Co.* 3 E. & B. 784, where a manda-

mus was obtained. As to examining the directors, see *Dickson v. Neath and Brecon Rail. Co.* L. R. 4d Ex. 87.

(*t*) See *Morisse v. The Royal British Bank*, 1 C. B. N. S. 67; *Green v. Nixon*, 23 Beav. 530. See, also, *Hardinge v. Webster*, 1 Dr. & Sm. 101, where it was held that a member of a company who had obtained judgment against it could not be restrained from enforcing that judgment against another member of the same company. The company was governed by 7 & 8 Vict. c. 110, and had become amalgamated with another company in which the defendant was a shareholder, but the plaintiff was not.

(*u*) See *Woodhams v. Anglo-Australian Co.* 2 DeG. J. & Sm. 162.

tions against shareholders generally, it is proposed to examine more in detail the law relating to *sci. fa.*, and to proceedings against shareholders in companies governed by the Banking act of 9 Geo. 4, the act of 7 Wm. 4 and 1 Vict. c. 73, the Companies clauses consolidation act, and other companies.

*Proceedings by scire facias. (x)*

A writ of *scire facias* is a judicial writ, and is the commencement of a new action, founded on a judgment already obtained. The writ states the recovery of the judgment, and whatever facts are necessary to show that the person against whom the writ is issued is liable to be proceeded against on that judgment; and the shareholder against whom the writ is issued is commanded to appear to show why the plaintiff ought not to have execution against him. The writ is set out in a declaration or statement of claim, which prays that execution \*524 may \*issue against the defendant (*y*); and which may be pleaded or demurred to, in the ordinary way. (*z*) Issue having been joined, the cause proceeds to trial. (*a*) A judgment obtained against a defendant in a *sci. fa.* is executed like any other judgment. But the Court will compel the creditor to limit the amount for which execution is sued out to what may then be really due to him. This is done by putting the creditor on terms when leave to issue a *sci. fa.* is granted. (*b*)

(*x*) The Judicature acts and rules contain no provisions specially applicable to these proceedings. But the general provisions applicable to all actions, apply, it is conceived, to them.

(*y*) See the pleadings in *Ricketts v. Bowhay*, 3 C. B. 889, where the writ and declarations are set out in full. See, too, *Bradley v. Eyre*, 11 M. & W. 432; *Nunn v. Claxton*, 3 Ex. 712. In some of the forms the writ is directed to the sheriff, but in others it is directed to the individual shareholder.

(*z*) See *Esdale v. Trustwell*, 1 Ex.

371; *Bank of Scotland v. Fenwick*, ib. 792; *Ness v. Fenwick*, 2 Ex. 598; *Nunn v. Claxton*, 3 Ex. 712, in each of which the declaration was demurred to. Several matters may be pleaded: *Phillipson v. Tempest*, 8 Jur. 60. As to the practice and forms, see 2 Chitty's *Archbold's Practice*, and Chitty's *Forms thereto*.

(*a*) The jury must not be shareholders, *Esdale v. Lund*, 12 M. & W. 734.

(*b*) See *Harvey v. Scott*, 11 Q. B. 92; *Green v. Nixon*, 23 Beav. 530; *Addison v. Tate*, 11 Ex. 250.

A *sci. fa.* issued irregularly, *e. g.*, without leave, where leave is required, will be set aside; but a plea to it, alleging merely an irregularity for which it might be set aside, is bad. (*c*)

A judgment creditor of a company may issue as many concurrent writs of *sci. fa.* against as many shareholders as he thinks proper; and so long as his demand is unsatisfied, a defense by any shareholder that the plaintiff is proceeding against others is bad. (*d*) Even the circumstance that judgments have been already obtained against them on the writs issued against them, affords no ground of defense; for such judgments do not extinguish the right conferred upon the creditor by the prior judgment obtained against the company. (*e*) Even before pleas in abatement were abolished it \*was decided that to a *sci. fa.* \*525 against a shareholder the non-joinder of other persons liable to be proceeded against, could not be pleaded in abatement; and if one *sci. fa.* issued against several shareholders, a declaration upon it against some of them only was not bad on demurrer, even if it were irregular. (*f*) Neither is it any objection to a *sci. fa.* by a creditor against a shareholder that other creditors are suing him or are in a position to issue execution against him (*g*); although when he has paid the full amount to which he is liable, no other creditor can extract more from him. (*h*)

A rule for a *sci. fa.*, or an application for leave to issue execution (in those cases in which no *sci. fa.* is necessary) may, it seems, be moved for, or made, more than once by the same creditor against the same shareholder for the same debt, if the same rule or application has been allowed to drop for any satisfactory reason, or has been refused upon some technical ground

(*c*) *Marson v. Lund*, 16 Q. B. 344; *Bradley v. Warburg*, 11 M. & W. 452; *Ricketts v. Bowhay*, 3 C. B. 889; *Bank of Scotland v. Fenwick*, 1 Ex. 792; *Bosanquet v. Graham*, 7 Jur. 831, Q. B. See as to suing out a *sci. fa.* on a judgment entered up for costs, *Farmer v. Mottram*, 6 Man. & Gr. 684.

(*d*) See *Rigby v. Dublin Trunk Rail. Co.* L. R. 2 C. P. 586; *Nixon v. Brownlow*, 1 H. & N. 405; *Nunn v. Lomer*, 3 Ex. 471. Compare *Esdaile v. Trust-*

*well*, 2 Ex. 312, and *Esdaile v. Lund*, 12 M. & W. 647.

(*e*) *Burmester v. Crofton*, 3 Ex. 397.

(*f*) *Fowler v. Rickerby*, 2 Man. & Gr. 760, decided on 7 Geo. 4, c. 46. See the argument in *Esdaile v. Lund*, 12 M. & W. 647.

(*g*) *Rigby v. Dublin Trunk Rail. Co.* L. R. 2 C. P. 586.

(*h*) *Burke v. Dublin Trunk Rail. Co.* L. R. 3 Q. B. 47.

which has been removed. At the same time the maxim, *nemo debet bis vexari pro eadem causa* is applicable, unless some good reason to the contrary can be shown. (i)

A judgment against a company, the shareholders of which are liable to execution on the judgment, may be executed against them, although the creditor has issued an *elegit* against the company, and has obtained partial satisfaction by an extent under the writ. (k) The extent does not, in these cases, satisfy the debt. If the creditor has received nothing from the extent, he is entitled to execution for his whole demand; and if he has obtained any fruits from the extent, he is still entitled to execution for so much as remains due. (l) If the land extended is of small value compared with what is due to the creditor, he is entitled to execution against the shareholders without delay; but if the land is of such a value that the creditor will in a short time be able to obtain payment without having recourse to the shareholders, the court will not, as a matter of course, let immediate execution against them be issued. (m)

Except where judgment has been obtained by fraud, the validity of a judgment which has been recovered against a company or its public officer, cannot be impeached by a shareholder who is proceeded against by *sci. fa.*; for, excepting in cases of fraud, nothing is admissible as a defense to a *sci. fa.* which might have been relied on as a defense to the action on the judgment in which the *sci. fa.* issues. (n) The judgment is conclusive, and nothing can be set up as a defense to a *sci. fa.* upon it, except some matter which is consistent with the validity of the judgment itself.

Thus in *Peddell v. Gwyn* (o), judgment had been obtained against the official manager of a company completely registered under 7 & 8 Vict. c. 110, upon a bill of ex-

(i) See, upon this, *Corder v. The Universal Gas Light Co.* 6 C. B. 190 and 554; *Field v. Mackenzie*, ib. 384; *Dodgson v. Scott*, 2 Ex. 457. *Edwards v. Cameron's, &c. Rail. Co.* 15 Jur. 470. Ex., is a strong authority for not allowing two applications.

(k) *Addison v. Tate*, 11 Ex. 250; *R. v. The Derbyshire Rail. Co.* 3 E. & B. 784.

(l) See *Addison v. Tate*, 11 Ex. 250, from which it appears that the *sci. fa.*

should state what has been done under the *elegit*, and the amount if any obtained by it.

(m) See *Addison v. Tate*, 11 Ex. 250.

(n) See *per* Lord Mansfield in *Cook v. Jones*, Cowp. 727.

(o) 1 H. & N. 590. See, too, *Bradley v. Urquhart*, 11 M. & W. 546; *Philpison v. Egremont*, 6 Q. B. 587, and the cases in the next note.

change accepted for the company by two of its directors in the form prescribed by the act. Upon this judgment a *sci. fa.* was issued against a shareholder, who pleaded in effect that the directors had no authority to accept bills binding on the shareholders to a greater extent than the amount unpaid up of their shares, and that he, the defendant, had paid up his shares in full. This plea was on demurrer held bad, inasmuch as, assuming that the bills had been accepted without authority, the judgment which had been obtained precluded the company and all its shareholders from raising that question. The court considered it clear that after judgment against a joint-stock company, a shareholder cannot set up as a defense any matter which would have afforded an answer to the original action.

Upon the same principle it seems that if judgment is \*obtained against a person sued as a public officer, a share- \*527 holder cannot plead as a defense to a *sci. fa.*, that the person against whom the judgment has been obtained was not the representative of the company. (*p*) In such a case application should be made to set aside the judgment. (*q*)

A judgment obtained by default is, in the absence of fraud, as conclusive against the shareholders as any other judgment. (*r*)

Judgment by default.

A judgment obtained by fraud and collusion is always impeachable by innocent parties affected by it; and however high the tribunal in which the judgment has been pronounced may be, its invalidity on the ground of fraud may be examined by any inferior court which may happen to be called upon to give effect to it. (*s*) If, therefore, a shareholder is proceeded against upon a judgment obtained by fraud on the part of the creditor, the judgment may be impeached; and it seems that the shareholder may at his option either apply to the Court in which the judgment was obtained to have it set aside, or rely on the fraud as a defense to a *sci. fa.* or to an application for leave to issue execution as the case may be. (*t*)

Exceptions in cases of fraud on the part of the creditor.

(*p*) See *Bradley v. Eyre*, 11 M. & W. 432; *Fowler v. Rickerby*, 2 Man. & Gr. 760.

(*q*) *Ibid.* and *Bosanquet v. Graham*, 7 Jur. 832, and 6 Q. B. 601, note.

(*r*) *Green v. Nixon*, 23 Beav. 530. See, also, *Ex parte Chorley*, 11 Eq. 157.

(*s*) See *Shedden v. Patrick*, 1 McQu. 535: The Duchess of Kingston's case, in 2 Sm. L. C. and the admirable dissertation upon it there.

(*t*) See *Dodgson v. Scott*, 2 Ex. 457; *Edwards v. The Kilkenny Co.* 2 C. B. N. S. 397; *Philipson v. Egremont*, 6 Q. B.

Philipson *v.* Egremont (*u*) affords a good example of a successful defense to a *sci. fa.* on the ground of fraud on the part of a judgment creditor. In that case an action was brought against the registered officer of a company formed under the Letters Patent act, upon a bill of exchange drawn and endorsed by the agent of the company, and judgment was recovered against the defendant in that action. A shareholder in the company \*528 pleaded to a *sci. fa.* on the judgment, that the \*original action was for a demand in respect of which neither he, nor the company, nor its registered officer, was by law liable, as the plaintiff knew, and that, the registered officer of the company and the plaintiff knowing the premises, such officer fraudulently and deceitfully and by connivance with the plaintiff, suffered the judgment to be recovered in order that the plaintiff might proceed against and obtain payment from him, the shareholder. Upon demurrer this plea was held good.

It is to be observed that the fraud relied upon in the above case as a defense to the *sci. fa.*, was fraud on the part of the judgment creditor. Fraud on a shareholder by the directors of the company, and to which fraud the creditor is not privy, affords no defense to proceedings by him against the shareholder. This was decided in several cases arising out of the failure of the Royal British Bank, and is a necessary consequence of those principles of the law of partnership which have been discussed in the First Book of the present treatise.

In Henderson *v.* the Royal British Bank (*x*), the plaintiff had obtained judgment against a company incorporated by letters patent under the 7 & 8 Vict. c. 113, and he had also obtained a rule calling upon a shareholder to show cause why execution on such judgment should not issue against him. The shareholder insisted that no proceedings should be taken against him because he had been induced to become a shareholder

587; Bosanquet *v.* Graham, 6 Q. B. 601, note; Green *v.* Nixon, 23 Beav. 530. The first two of these cases, and Harvey *v.* Scott, 11 Q. B. 92, show that it is not proper to raise the question of fraud upon a motion for leave to issue a *sci. fa.*

(*u*) 6 Q. B. 587.

(*x*) 7 E. & B. 356. See, too, Dan-

nell *v.* the Royal Brit. Bank, 1 H. & N. 681; Powis *v.* Harding, 1 C. B. N. S. 533. Howard *v.* Shaw, 9 Ir. Law Rep. 335, shows that a shareholder sued for a debt of the company cannot escape payment on the ground that the company was concocted in fraud, and that its deed of settlement was invalid.

by the false and fraudulent statements of the directors of the company, and had repudiated his shares as soon as he had discovered the fraud. But it was held that these were matters with which the creditor had nothing to do. The judgment of Lord Campbell in this case, so far as it bears upon the effect of the fraud relied upon, was as follows:—

“This was an application for leave to take out execution against a shareholder ; and the proposed answer to the application was, that the shareholder had been induced by fraud to take the shares. He had \*remained a share- \*529 holder for some time, and received dividends, and acted in all respects as a shareholder, until the Royal British Bank stopped payment, and until its bankruptcy, and he then gave notice that he was no longer a shareholder, and, as far as he could, disaffirmed the contract under which he became a shareholder, as being induced by the fraud of the directors ; he demanded back all the moneys he had paid, and, being a depositor himself, he demanded the deposit, and all the advances. The question is whether, if it were established that this fraud had been practiced upon him, it could be an answer to the application. If there were any doubts about it, we should not make this rule absolute ; but we should direct a *scire facias* to issue, so that the question might be raised on the record. We entertained no doubt on the argument : but being informed that similar applications had been made to the Courts of Common Pleas and Exchequer, and that rules were depending in those Courts, we thought that upon a matter of this sort it would be well if we had a conference with the other judges before our judgment was given. That conference has taken place : and the judges are unanimously of opinion that this can be no answer to the application either upon principle or authority. This is an application by a creditor, who, upon the faith of the party who then was a shareholder, and who held himself out to the world as a shareholder, and being one, gave credit to the bank. (y) He has obtained judgment against the bank. There were no assets of the bank as a company, and the application now is that execution may issue against that party individually. It would be monstrous to say that he having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank who had given credit to it on the faith that he was a shareholder. It would be monstrous injustice and contrary to all principle. Whether we could say that, with regard to other shareholders not privy to the fraud, we need not say ; there may be some difficulty about that. But that is not the question we have to determine ; which is simply, whether this is an answer to a creditor who has given trust upon the faith of his being a shareholder. Suppose this were a common partnership, and that there was credit given to the firm : would it be an answer to an action by a creditor against one of

Henderson v.  
Royal British  
Bank.

(y) It may well be doubted whether, if the creditor had nothing to rely on, except that the shareholder had held himself out as a partner, the decision

could be justified ; for there was nothing to show that the shareholder held himself out as a partner to the plaintiff. See, *ante*, p. 50, *et seq.*

the partners that the defendant was fraudulently induced by the other partners to become a partner? *Inter se*, that might be considered; but, as between the firm and a creditor, it is a matter wholly immaterial."

A shareholder in a company cannot escape from the liability to its creditors which is imposed upon him as a shareholder, except by virtue of some act of theirs: Creditor proceeding against shareholder after inducing him to become such. \*530 and nothing short of \*fraud on their part, or of some contract or conduct of theirs precluding them from treating him as their debtor, will afford him a defense as against them so long as their demand exists as between them and the company. This is well illustrated by the recent case of *Bill v. Richards* (*z*), where a shareholder in a railway company pleaded to a *sci. fa.* issued against him by a creditor who had obtained judgment against the company, that he, the shareholder, had at the request of the plaintiff taken shares in the company as a trustee for others, and upon the faith of the plaintiff's statement that by so doing no responsibility in respect of the shares would be incurred. It was not alleged that the plaintiff had been guilty of any fraud; his statement did not relate to any matter of fact; it did not amount to a contract of indemnity, nor to a contract that if he were a creditor of the company he would not endeavor to obtain payment from the defendant. It was quite consistent that all that was meant was, that if the defendant would allow shares to be taken for others in his name they would indemnify him against the consequences, and the defense was therefore held insufficient, although pleaded as a defense on equitable grounds.

The effect which a contract by a company to pay out of its funds, and those only, has in limiting the liability of the shareholders, has been already examined. (*a*) Where No sci. fa. by creditor whose right is limited to company's funds. such a contract has been entered into, no execution on the judgment against the company will go against the shareholders at the suit of a person seeking to enforce that contract (*b*); he must obtain some order against them personally. (*c*)

Having now adverted to those rules and principles which are applicable generally to proceedings against shareholders, upon judgments obtained against the company Sci. fa., &c., under particular acts.

(*z*) 2 H. & N. 311. Compare *Batty v. McCundie*, 3 Car. & P. 203; *Connop v. Levy*, 11 Q. B. 769.

(*b*) *Halket v. The Merchant Traders'* Ass. 13 Q. B. 960.

(*c*) See *ante*, p. 332.

(*a*) *Ante*, p. 377.

of which they are members, it is necessary to examine with more minuteness the liability of shareholders in different sorts of companies.

*\*Execution against members of companies governed by 7 Geo. 4 c. 46. \*531*

The Banking companies act of Geo. 4 requires the public officers of a company governed by that act to be members of the company (*d*), and enacts that execution upon any judgment obtained against a public officer may be issued against any member of the company. (*e*) From this it follows that a public officer of a company governed by the act in question is personally liable upon every judgment obtained against him; and that writs can issue against him grounded on such judgment, and that, so far as he is concerned, no *sci. fa.* or other intermediate proceeding is necessary. (*f*) If, indeed, the public officer named in the judgment has ceased to be a member of the company, then, by the act, he is only liable like other former shareholders; and upon an affidavit by him, the court will stay execution against him until after he has been proceeded against by *scire facias*. (*g*)

Execution  
against public  
officer under 7  
Geo. 4, c. 46.

The act in question, 7 Geo. 4, c. 46, allows a creditor, who has obtained judgment against the public officer to execute that judgment—

Liability of  
shareholders  
under 7 Geo. 4,  
c. 46.

1. Against any member for the time being of the company; and in case any such execution shall be ineffectual, then

2. Against any person who was a member of the company at the time the contract sued upon was entered into; *or*

3. Against any person who became a member at any time after such contract was entered into, but before it was executed; *or*

4. Against any person who was a member at the time when the judgment was obtained.

But persons who are not members for the time being, and so do not fall within the first class, are only liable for three years after they have ceased to be members. (*h*)

(*d*) 7 Geo. 4, c. 46, § 4.

(*e*) § 13.

(*f*) *Harwood v. Law*, 7 M. & W.

(*g*) See *Harwood v. Law*, 7 M. & W. 203.

(*h*) 7 Geo. 4, c. 46, § 13.

It appears, therefore, that a creditor must go first of all against the members for the time being, and that until he has \*done so he cannot go against late members (*i*); and by members for the time being are meant, not members at the time judgment was obtained against the public officer, but members at the time a *sci. fa.* on the judgment is issued. (*k*) Members for the time being in this sense can be proceeded against at once, and the statute expressly allows proceedings to be taken against any one or more of them. Their liability, it will be observed, is much more extensive than the liability of ordinary partners; not being confined to debts incurred after they became partners.

It is settled that a *sci. fa.* is the proper mode of proceeding against shareholders under this act. (*l*) The names of the shareholders can be ascertained from the returns made to the Stamp Office. (*m*)

A creditor is not bound to proceed against all the members for the time being before having recourse to former members; but he must make every reasonable effort to obtain payment from the first before he acquires a right to proceed against the last. Acting upon this principle, the Court allowed a *sci. fa.* to issue against a late member, although proceedings against a member for the time being were pending, evidence being given to show that nothing was to be got from him, and that evidence being uncontradicted. (*n*) So in another case, a late member was allowed to be proceeded against, although some only of the members for the time being had been sued ineffectually, uncontradicted evidence being given that inquiry had been made as to the solvency of the others, and that there was reason for believing that payment could not be obtained from any of them. (*o*) So

(*i*) Hence a late member was a competent witness for the public officer. *Needham v. Law*, 12 M. & W. 560.

(*k*) See *Dodgson v. Scott*, 2 Ex. 457. See, too, *Bradley v. Eyre*, 11 M. & W. 432, which turned on a private act in which similar words occurred.

(*l*) *Ransford v. Bosanquet*, 2 Q. B. 972, and *Bosanquet v. Ransford*, 11 A. & E. 520, and *Cross v. Law*, 6 M. & W. 217; *Wittenbury v. Law*, 6 Bing. N. C.

345; *Williams v. Aspinall*, 7 Scott, 822, *contra*. is not to be relied upon. The rule for a *sci. fa.* against present members is absolute in the first instance, and need not be moved for in open court, *Harrison v. Tysan*, 1 Bail Ct. Ca. 111.

(*m*) See 7 Geo. 4, c. 46, § 4, *et seq.*

(*n*) *Dodgson v. Scott*, 2 Ex. 457.

(*o*) *Harvey v. Scott*, 11 Q. B. 92; *Field v. Mackenzie*, 4 C. B. 705.

it was unnecessary for the creditor to \*issue writs of *ca. sa.* \*533 against the existing shareholders before proceeding against former members. (*p*) Moreover, a mortgagee who has obtained judgment for his debt, and has done his best to obtain payment by executing that judgment against the members for the time being, is, it seems, entitled to proceed against former members, even without realizing his mortgage. (*q*) On the other hand, the Court will refuse a creditor leave to issue a *sci. fa.* against a late member where there is reason to believe that satisfaction can be got with diligence from existing members (*r*); and a return of *nulla bona* to a writ of *fi. fa.* issued against the public officer, together with a loose affidavit as to the insolvency of the members for the time being, will not of itself be sufficient to satisfy the Court that payment from them cannot be obtained. (*s*)

With respect to late members, the act, as has been seen, makes three classes of them liable, and renders it lawful for the creditor to proceed against any or all of them, not <sup>Classes of former members.</sup> confining him to one class before having recourse to another. (*t*) The liability of late members is, in some respects, more extensive than the liability of retired partners at common law, inasmuch as these last are not liable to be sued in respect of debts contracted before they became members. But, on the other hand, the statute limits the duration of a late member's liability to creditors to three years after retirement. (*u*) Moreover, there is one class of late members who cannot be proceeded against by a creditor at all, viz., those who did not become members until after his debt had arisen, and who had ceased to be members before he obtained judgment against the public officer. Whether the omission of all members of this class was designed or accidental is not known; but being \*omitted, their freedom from liability towards creditors is \*534 complete. (*x*)

(*p*) *Field v. Mackenzie*, 4 C. B. 732.

(*q*) *Ib.* 4 C. B. 725. The mortgage in that case could not be realized at once without great loss.

(*r*) *Eardley v. Law*, 12 A. & E. 802. See, too, *Cross v. Law*, 6 M. & W. 217.

(*s*) *Bank of England v. Johnson*, 3 Ex. 598.

(*t*) A rule for a *sci. fa.* against a late member must be served personally, or

be shown to have reached him, *Esdaile v. Smith*, 18 L. J. Ex. 120.

(*u*) This limitation applies only to creditors, and does not prevent a late shareholder from being a contributory, although three years may have elapsed since he retired from the company. *Gouthwaite's case*, 3 Mc. & G. 187.

(*x*) See *Dodgson v. Scott*, 2 Ex. 457, and *Harvey v. Scott*, 14 Q. B. 92.

A creditor, being entitled to issue execution only against members for the time being, or, if necessary, against certain classes of late members, must, before he can obtain leave to issue a *sci. fa.* against any particular person, adduce some evidence to show either that such person is a member for the time being, or that he was a member at the time when the contract with the creditor was entered into, or before the same was executed, or at the time judgment was recovered. (y) For this purpose recourse is usually had to the memorial of shareholders, directed to be returned to the Stamp Office, which is held to be sufficient if uncontradicted, even although it may be in some respects informal (z) or inaccurate as regards the name of the shareholder proceeded against. (a) The memorial is not, however, conclusive, nor is it the only evidence of membership; and it has been decided that a person whose name is omitted from the last return may nevertheless be proved, *aliunde*, to have been a shareholder when the return was made, and that, if there is a dispute as to the fact of membership, a *sci. fa.* ought to issue in order that the creditor may have an opportunity of trying that question. (b)

As between a creditor and an alleged shareholder, the question of membership or no membership depends entirely upon whether these requisites which, by the company's deed, have to be complied with before a person becomes a member, have been complied with or not; and it may happen that one and the same person is not a member for the purpose of being proceeded against by a *sci. fa.*, although he may be a member for the purpose of being made a contributory on the winding up of the company. In *Ness v. Angas* (c), a husband was held not to be liable to be proceeded against by a *sci. fa.* in respect of shares held by his wife, he not having complied with the terms of the company's deed, so as to make himself a member in respect of such shares.

*Ness v. Angas.*

(y) In *The Bank of England v. Johnson*, 3 Ex. 598, the Court let a *sci. fa.* issue against a person, although there was strong evidence against his having been a member at the time alleged.

(z) See *Ex parte Prescott*, Mon. & Ch. 611; *Harvey v. Scott*, 11 Q. B. 92; *Field v. Mackenzie*, 4 C. B. 705 and 717; *Bosanquet v. Shortridge*, 4 Ex.

699. Compare *Prescott v. Buffery*, 1 C. B. 41; *ante*, p. 162.

(a) *Clowes v. Brettell*, 11 M. & W. 461, decided on a private act. See, too, *Thompson v. Harding*, 1 C. B. N. S. 555.

(b) *Bank of England v. Johnson*, 3 Ex. 598; *Prescott v. Buffery*, 1 C. B. 41.

(c) 3 Ex. 805. See, too, *Dodgson v. Bell*, 5 Ex. 967.

In *Ness v. Armstrong* (*d*), a similar decision was come to with respect to an executor, although he had been paid dividends on the shares to which he was as executor entitled; and in *Bosanquet v. Shortridge* (*e*), it was held that a member who had sold his shares, and had them transferred to the purchaser, and who thenceforth, and for some years, had had nothing to do with the company, continued nevertheless, as between himself and creditors, to be liable as an existing shareholder, he not having duly complied with the requisites of the company's deed, so as to exchange places with the purchaser. Similar decisions have been made upon statutes relating to other companies.

*Ness v. Armstrong.*

*Bosanquet v. Shortridge.*

*Execution against members of Companies governed by the Letters Patent act.*

The Letters Patent act (7 Wm. 4 & 1 Vict. c. 73) does not require the public officers of a company governed by it to be members of the company; and even if they are members their liabilities are restricted to the extent specified in the letters patent of their respective companies. These circumstances alone, it is conceived, render it improper for a creditor to issue execution against a public officer of a company governed by the Letters Patent act without a *sci. fa.*; for it is clear from the act that he cannot be made personally liable unless he is or has been a member, and in neither case is he liable to the extent to which he would be liable at common law.

*Execution against public officer under 7 Wm. 4 and 1 Vict. c. 73.*

The act in question appears to empower a creditor who has obtained judgment against the public officer of a company governed by it, to execute that judgment against all or any of the shareholders, or late shareholders whom he might have sued for payment at common law; the only qualifications being: 1. that a shareholder who transfers his shares continues a shareholder for all purposes of liability until the \*transfer has been registered; and 2, that the extent of a \*536 shareholder's liability is limited or unlimited, according to the letters patent granted to the company. (*f*) This act has not re-

*Liability of shareholders under 7 Wm. 4 & 1 Vict. c. 73.*

(*d*) 4 Ex. 21.

(*e*) 4 Ex. 699.

(*f*) 7 Wm. 4 & 1 Vict. c. 73, §§ 21

& 24; and see, upon it, *Philipson v. Egremont*, 6 Q. B. 587.

ceived any judicial interpretation throwing light upon the liabilities imposed by it, and it is by no means clear, that the liability of an incoming shareholder is not more extensive than the ordinary liability of an incoming partner.

The names of the shareholders can be ascertained from the returns made to the Court of Chancery. (*g*)

*Execution against members of companies governed by 8 & 9 Vict. c. 16.*

With respect to companies governed by the Companies consolidation act (8 & 9 Vict. c. 16), there is one important rule which has no analogy with anything met with in the law applicable to ordinary partnerships, or in that applicable to companies governed by the Banking act of 7. Geo 4, c. 46, or by the Letters Patent act of 7 Wm. 4 and 1 Vict. c. 73. The rule referred to is, that the creditors of a company governed by the Companies clauses act, are not entitled to proceed against the shareholders personally, if payment can be obtained from the company. In other words, the creditors must have recourse to the assets of the company before they can have recourse to the shareholders individually. When, therefore, an application is made for leave to issue a *sci. fa.* or execution against a shareholder in a company governed by the act in question, evidence must be adduced to satisfy the Court that payment cannot be obtained from the company itself as a body (*h*). The

Under 8 & 9  
Vict. c. 16, creditor must first go against the company;  
  
and show that he cannot obtain payment from it.

creditor need not show that there is no possibility of the company ever paying him; all that the Court requires is to be satisfied that the creditor applying for leave to proceed against the shareholders has no means of obtaining \*537 \**present* payment except from them individually. In order to satisfy the court upon this head, the creditor must prove that he has made reasonable attempts to obtain payment from the company, and to discover assets *presently* available for his satisfaction, and that such attempts have been unsuccessful. A mere

(*g*) *Ib.* § 6, *et. seq.*

(*h*) The same rule applied to companies governed by the repealed acts of 7 & 8 Vict. cc. 110 and 113. It seems that the *sci. fa.* need not contain any averment that nothing can be got from

the company. *Hitchins v. The Kilkenney Rail. Co.* 15 C. B. 459, but if it does, the averment may be traversed. *Marson v. Lund*, 16 Q. B. 344. See *Nixon v. Brownlow*, 1 H. & N. 405.

general assertion by an attorney's clerk that writs of *fi. fa.* have been issued against the company and returned *nulla bona*, is not sufficient; for it is consistent with such an assertion that no attempt has been made to ascertain whether the company has any assets or not. (i) But if attempts have been made to discover assets, and those attempts have been fruitless, and a writ of *fi. fa.* has issued against the company and been returned *nulla bona*, that will be sufficient until it is shown affirmatively that the company has assets (k); and even if the company has assets which have not been taken in execution, still, if the court is satisfied that they are insufficient to satisfy the plaintiff, the *sci. fa.* will go. (l)

By the Companies clauses consolidation act, a judgment recovered against a company to which such act applies, may, if necessary, be executed against any of the shareholders. But no shareholder is liable to a greater extent than the amount unpaid up of his shares in the company. (m)

Liability of shareholders under 8 & 9 Vict. c. 16.

The expression, "any of the shareholders," has been decided to mean any of the shareholders at the time execution against the company is found to be ineffectual, *i. e.*, in ordinary cases, at the time of the sheriff's return of *nulla bona*. (n) \*Consequently, not only all persons

"Any of the shareholders."

who have ceased to be shareholders before judgment against the company has been recovered, but also all who have ceased to be so after that time, but before it has been ascertained that execution against the company on such judgment will prove ineffectual, are wholly exempt from liability to the judgment creditor. (o)

*Sci. fa.* is the proper mode of proceeding against a shareholder under this act, and every shareholder intended to be proceeded against, is to have sufficient notice in writ-

*Sci. fa.* necessary.

(i) See *Hitchins v. The Kilkenny Rail. Co.* 10 C. B. 160, and 15 ib. 459; *King v. The Parental Endowment Co.* 11 Ex. 443.

(k) *Rastrick v. The Derbyshire Rail. Co.* 9 Ex. 149; *Nixon v. The Kilkenny Rail. Co.* 1 H. & N. 47; *Hitchins v. The Kilkenny Rail. Co.* 15 C. B. 459; *Wyll v. The Darenth Rail. Co.* 2 C. B. N. S. 110; *Ridgway v. The Security, &c. Ass. Soc.* 18 C. B. 686. The return by the sheriff need not be filed when the *sci. fa.* is moved for; *Ilfracombe Rail. Co. v. Devon and Somerset Rail. Co.* L. R. 2

C. P. 15; and see *infra*, notes (n) and (p).

(l) *Ilfracombe Rail. Co. v. Lord Poltimore*, L. R. 3 C. P. 288; *Rigby v. Dublin Trunk Rail. Co.* L. R. 2 C. P. 586.

(m) 8 & 9 Vict. c. 16, § 36. See *Burke v. Dublin Trunk Rail. Co.* L. R. 3 Q. B. 47; *Guest v. Worcester Rail. Co.* L. R. 4 C. P. 9, in the last case the shares were not in fact paid up.

(n) *Nixon v. Green*, 11 Ex. 550, and 3 H. & N. 686; *Nixon v. Brownlow*, 3 H. & N. 686.

(o) *Ibid.*

ing before application for leave to issue a *sci. fa.* against him is made. (*p*)

Leave to issue a *sci. fa.* will be refused if the Court is of opinion that there is a clear defense to it. (*q*) On the other hand a *sci. fa.* may be dispensed with if the shareholder does not desire to contest his liability. (*r*)

The meaning of the word shareholder in this act of Parliament has been already examined (*s*); and it is only necessary here to observe that the company's register of shareholders, which a creditor who has obtained judgment against the company has a right to inspect (*t*), is, in the absence of evidence to the contrary, sufficient proof that a person whose name is on it is a shareholder. (*u*) But the register is not conclusive evidence, and leave to issue a *sci. fa.* against a person who is on it will not be given if he can show that he is not a shareholder. (*x*) Neither is the register the only evidence that a person is a shareholder; and a *sci. fa.* lies against a person made a member of the company by its special act, although no shares have been issued (*y*); and in a case where a creditor was prevented from seeing the register, a *sci. fa.* was allowed to issue against a person sworn to be a shareholder to the belief of the deponent, and which belief was founded on information from officials connected with the company. (*z*)

(*p*) 8 & 9 Vict. c. 16, § 36. See *Hitchins v. Kilkenny Rail. Co.* 10 C. B. 160; *Devereux v. Kilkenny Rail. Co.* 5 Ex. 834. See *Ilfracombe Rail. Co. v. Devon and Somerset Rail. Co.* L. R. 2 C. P. 15, and *Edwards v. Kilkenny Rail. Co.* 1 C. B. N. S. 409, as to serving the notice and rule *nisi* on the shareholder. See, as to enforcing decrees in equity without a *sci. fa.*, *Healey v. Chichester and Midhurst Rail. Co.* 9 Eq. 148.

(*q*) See, as to the discretion of the court, *Shrimpton v. Sidmouth Rail. Co.* L. R. 3 C. P. 80; *Lee v. Bude, &c. Rail. Co.* L. R. 6 C. P. 576; *Burke v. Dublin Trunk Rail. Co.* L. R. 3 Q. B. 47. However, in *Guest v. Worcester Rail. Co.* L. R. 4 C. P. 9, the court allowed a *sci. fa.*

to go, although the case was clear.

(*r*) *Burke v. Dublin Trunk, &c. Rail. Co.* L. R. 3 Q. B. 47.

(*s*) *Ante*, p. 156.

(*t*) 8 & 9 Vict. c. 16, § 36. *R. v. The Derbyshire, &c. Rail. Co.* 3 E. & B. 784; *Meador v. Isle of Wight Ferry Co.* 9 W. R. 750, which shows that a mandamus is not necessary.

(*u*) See 8 & 9 Vict. c. 16, §§ 8 and 29.

(*x*) *Edwards v. Kilkenny Rail. Co.* 14 C. B. N. S. 526; *Mather v. Nat. Assoc. Investment Soc.* ib. 676.

(*y*) *Portal v. Emmens*, 1 C. P. D. 201, *ante*, p. 157.

(*z*) *Rastrick v. The Derbyshire, &c. Rail. Co.* 9 Ex. 149. See *ante*, p. 156, *et seq.*

*Execution against members of other companies.*

Companies empowered by special acts to sue and be sued, and the shareholders in which are liable for the debts of the companies, will generally be found to resemble companies governed by 7 Geo. 4, c. 46. (*a*)

Liability of shareholders in other companies.

Unregistered cost-book mining companies are partnerships, and shareholders in them may be proceeded against accordingly. (*b*)

Cost-book companies.

Shareholders in companies governed by the Companies act, 1862, are not liable to execution on judgments against the company, but must be proceeded against under the winding-up clauses, which will be examined hereafter. (*c*)

Companies governed by act of 1862.

The law respecting execution against members of companies governed by the repealed acts of 7 & 8 Vict. cc. 110 and 113, is now obsolete, and is therefore omitted. (*d*)

(*a*) See *Clowes v. Brettell*, 10 M. & W. 506; *Wingfield v. Barton*, 7 Jur. 258; *Wingfield v. Peel*, 13 L. J. N. S. Q. B. 102; and as to friendly societies, *Myers v. Rawson*, 5 H. & N. 99. The 17 & 18 Vict. c. 25, on which the last case turned, is repealed by 25 & 26 Vict. 87.

(*b*) *Lanyon v. Smith*, 3 Best & Sm. 939; *Tredwen v. Bourne*, 6 M. W. 461; *Newton v. Daly*, 1 Fos. & Fin.

26; *Peel v. Thomas*, 15 C. B. 714; *Toll v. Lee*, 4 Ex. 230; *Ellis v. Schmoeck*, 5 Bing. 521, are instances of successful actions against individual shareholders in cost-book mining companies.

(*c*) 25 & 26 Vict. c. 89, §§ 180 and 195.

(*d*) It will be found in the first edition of the present treatise, vol. i. pp. 458-462.

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## \*BOOK III.

OF THE RIGHTS AND OBLIGATIONS OF MEMBERS OF PARTNERSHIPS  
AND COMPANIES BETWEEN THEMSELVES.

## CHAPTER I.

## OF THE RIGHT TO TAKE PART IN THE MANAGEMENT OF THE AFFAIRS OF A PARTNERSHIP OR COMPANY.

## SECTION I.—OF ORDINARY PARTNERSHIPS.

Each member of ordinary partnership entitled to take part in its management.

In ordinary partnerships, the good faith of the partners is pledged mutually to each other that the business shall be conducted with their actual personal interposition, so that each may see that the other is carrying it on for their mutual advantage. (a)

In the absence of an express agreement to the contrary, the powers of the members of an ordinary partnership are in all respects equal, even although their shares may be unequal; and there is no right on the part of one or more to exclude another from an equal management in the concern. (b)<sup>1</sup> Moreover, if two persons are in partnership, and one of them mortgages all his share and interest therein to the other, the latter will not be permitted during the

(a) Per Lord Eldon in *Peacock v. Peacock*, 16 Ves. 51.

(b) *Rowe v. Wood*, 2 Jac. & W. 558; see, too, *Lloyd v. Loaring*, 6 Ves. 777.

<sup>1</sup>In law partnerships, either partner may attend to business intrusted to the firm. But if a firm contract with a client for the personal services of a partic-

ular partner, and he fails to perform them, it is a breach of contract; yet the damages for such breach will be but nominal, if another party shall perform the duty with due professional skill, and without injury to the client. *Smith v. Hill*, 13 Ark. 173.

continuance of the partnership, to avail himself of his rights as a mortgagee and to exclude his co-partner from interference in the partnership. (c) Indeed, speaking generally, it may be said that nothing is considered as so loudly calling for the interference \*of the Court between partners, as the improper ex- \*541 clusion of one of them by the others from taking part in the management of the partnership business. (d)

It need, however, hardly be observed that it is perfectly competent for partners to agree that the management of the partnership affairs shall be confided to one or more of <sup>Unless otherwise agreed.</sup> their number exclusively of the others; and that where such an agreement is entered into, it is not competent for those who have agreed to take no part in the management, to transact the partnership business without the consent of all the other partners.<sup>1</sup> But, as was seen in an earlier part of the treatise, every member of an ordinary firm is *primâ facie* its agent for carrying on its business in the usual way; and persons dealing with a partner within the limits of his apparent authority, are entitled to hold the firm answerable for his conduct, unless such persons had distinct notice that his real authority was less extensive than they had a right to assume it to be.

(c) *Rowe v. Wood*, 2 Jac. & W. 558.

(d) See, in addition to the cases last cited, *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Marshall v. Colman*, 2 ib. 266.

<sup>1</sup> If any one of the partners of a co-partnership give his assent to the acts of their agent, such assent would be good evidence affecting the rest, unless, by the articles or constitution of the company, the whole concern and management should be intrusted to a committee or board of managers; in which case the assent must be proved to have been given by them, or some of them, pursuant to the authority delegated to them by the company. *Odiorne v. Maxcy* 13 Mass. 178; S. C., 15 id. 39.

Evidence, both direct and circumstan-

tial, is admissible to prove that the sole power of conducting the business of a firm has been given to one partner. Such power may be inferred from the conduct of the partners for a series of years, as that one has exclusively conducted the business of the firm, and the other partner has never questioned his acts, or assumed to conduct the business himself. It is proper to show any reason existing, or expressed by the partners, why it was not desirable or desired that the other should conduct the business, as that he had little interest in the concern, while the interest of the managing partner was large. *Anthony v. Wheatons*, 7 R. I. 49.

## SECTION II.—OF COMPANIES.

One of the great peculiarities of companies, as distinguished from partnerships, is that the management of a company's business is entrusted to a few chosen individuals, and that the shareholders are deprived of that right of personal interference which is enjoyed by the members of ordinary firms. (e)<sup>2</sup>. The members of companies form two bodies, whose interests are or should be the same, but whose powers and functions are different; the one body consists of the directors, in whom the general powers of management are vested; and the other body consists of the shareholders, to whom the directors are accountable, and by whom they are generally appointed. Each of these bodies has its own sphere of action, and its own rights and duties, as will be seen more particularly hereafter.

Where there is no statutory or other provision regulating the constitution and powers of the managing body, the majority of the shareholders of the company must determine how its affairs are to be conducted, and to whom, and under what restrictions, the management of those affairs shall be entrusted. (f)<sup>1</sup> This is the rule which prevails in cost-book mining companies (g), and it is not easy to conceive what, except the will of the majority, can determine a matter of this description under the circumstances now supposed.

The number of persons composing the managing body of a company is generally fixed by the company's special act, charter, deed of settlement, or regulations, and the number making a *quorum* is also usually thereby fixed.<sup>2</sup> As a general rule, there is no doubt that a power entrusted to a given number of individuals cannot be properly exercised by any less number; and there are several cases in which the principle has been applied to companies, and in which the acts of directors have

(e) See *Burnes v. Pennell*, 2 H. L. C. 520 and 521.

<sup>2</sup> See *Ang. & Ames on Corp.* § 221.

(f) Agreements by directors depriving the shareholders of this power are invalid, *James v. Eve*, L. R. 6 H. L. 335. The powers of majorities will be examined hereafter.

<sup>1</sup> See generally as to the power of majorities, *Ang. & Ames on Corp.* §§ 221, 499.

(g) See *Tapping on the Cost-Book*, p. 64.

<sup>2</sup> See generally as to what constitutes a *quorum*, *Ang. & Ames on Corp.* § 501 *et seq.*

been held invalid on the ground that they were not done by the requisite number of directors. (*h*) But it does not therefore follow that the number of directors, as origi- <sup>Varying the number.</sup> nally fixed, cannot be altered by the majority of a meeting of the shareholders; and where the number is not fixed by the legislature or the Crown, it seems that the shareholders may alter it. (*i*) Even where the number is fixed by an act of Parliament or a charter, the act or charter may be so worded as to be in this respect directory only. (*k*)

It is to be observed that the directors of a company are not those only who choose to act, but all those persons who are constituted directors by a company's act, charter, or deed of settlement; and whether a person once a director has or has not ceased so to be, depends (except in the case of his death) upon the rules of the company. (*l*) A director who becomes \*bankrupt, or ceases to attend to his duties, does not there- \*543 by necessarily vacate his office. (*m*)

Generally speaking, the members of the managing body are required to possess certain qualifications, and to be appointed in some prescribed manner. (*n*) But it by <sup>Qualifications of directors.</sup> no means follows that persons who are in fact acting as duly qualified directors will be prevented from doing so, simply because they have been irregularly appointed. (*o*) Still less does it follow that the irregularity of their appointment will render all their acts null and void. Persons dealing with them as <sup>Irregular appointments.</sup> directors *bonâ fide*, and without notice of the irregularity are entitled to treat them as the agents of the company, and to hold the company bound by their acts, as if they were its duly appointed directors. (*p*) But, as between themselves and the shareholders, the irregularity is of greater importance; and it has been held that persons *de facto*, but not *de jure* directors, cannot make valid calls

(*h*) See *ante*, p. 244; and as to the power of directors to delegate their authority, see p. 247.

(*i*) *Smith v. Goldsworthy*, 4 Q. B. 430.

(*k*) *Thames Haven, Dock, &c. Co. v. Rose*, 4 Man. & Gr. 552. See, too, *Bargate v. Shortridge*, 5 H. L. C. 297.

(*l*) *Phelps v. Lyle*, 10 A. & E. 113.

(*m*) *Ibid*; see *Wilson v. Wilson*, 6 Scott, 540.

(*n*) As to disqualification by holding

other offices, see *Iron Ship Coating Co. v. Blunt*, L. R. 3 C. P. 484; *Eales v. Cumberland Black Co.* 6 H. & N. 481. As to the effect of giving votes for disqualified persons, see *R. v. Tewkesbury*, L. R. 3 Q. B. 629.

(*o*) See *Foss v. Harbottle*, 2 Ha. 461, and *Mozley v. Alston*, 1 Ph. 790. These cases will be noticed hereafter.

(*p*) See as to this, *ante*, pp. 249 and 253.

or forfeit shares, even where there is a provision rendering valid what may be done by persons acting as directors, notwithstanding the subsequent discovery of a defect in their appointment. (*g*)

Directors are supposed to know the regulations of their own company (*r*); and if a person becomes a director, and acts as such, he will not be allowed to take advantage of the fact that he was not duly qualified to act in that capacity. (*s*)

A provision that no person shall be eligible as a director \*544 \* unless he holds a certain number of shares, does not apply to persons who sign a company's memorandum of association, and who by that fact alone become directors until others are appointed. (*t*)

Where a person is required to hold a certain number of shares as a qualification for the office of director, those shares must not be nominally paid-up shares (*u*); but a director having the requisite number of shares is not disqualified for the office simply because he may have mortgaged his shares. (*x*)

Directors have no power to vote themselves fees for salaries for their services beyond what the constitution of the company may provide. (*y*)

The shareholders cannot usually exercise any control over the management of the company, except at meetings duly convened;<sup>1</sup> for the directors of a company are the servants, not of the individual shareholders, but of the company; and where the management of the directors is complained of, an aggrieved shareholder should seek redress through the company, and induce it to call the directors to account. (*z*) As will, however, be seen hereafter, if the directors are doing that which the share-

(*g*) See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; and *Miles v. Bough*, 3 Q. B. 845; *Edinburgh, &c. Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *South-Eastern Rail. Co. v. Hebblewhite*, 12 A. & E. 497; *Swansea Dock Co. v. Levien*, 20 L. J. Ex. 447. Compare *Murray v. Bush*, L. R. 6 H. L. 37, turning on 7 & 8 Vict. c. 110, § 30.

(*r*) See *per Lord Westbury in Lane's case*, 1 DeG. J. & S. 506. Compare *Marquis of Abercorn's case*, 4 DeG. F. & J. 78.

(*s*) See *Harward's case*, 13 Eq. 30;

*Fowler's case*, 14 Eq. 316; and *infra*, under the head *Contributories*.

(*t*) *Stock's case*, 4 DeG. J. & Sm. 426; and see *Cotterell's case*, 11 W. R. 13.

(*u*) *Roney's case*, 4 DeG. J. & Sm. 426; *Currie's case*, 3 DeG. J. & Sm. 367.

(*x*) *Cumming v. Prescott*, 2 Y. & C. Ex. 488.

(*y*) See *Evans v. Coventry*, 8 DeG. Mc. & G. 835, decree, clause 3. See *infra*, book iii. ch. 6, § 2.

<sup>1</sup> See *Ang. & Ames on Corp.* § 221.

(*z*) See *Orr v. Glasgow Rail. Co.* 3 McQu. 799.

holders cannot sanction, or that which they have by a proper resolution forbidden, the dissentients may obtain redress by legal proceedings. (a)

It may, however, happen that the constitution of a company is such that the shareholders are deprived of all control over the managing body in matters not foreign to the objects of the company. Where this is the case, the managers have it in their power to disregard the wishes of the shareholders as to all such matters. (b)

Where the shareholders have power to remove a director for "any reasonable cause," the shareholders are themselves \*the judges as to what is and what \*545 Removal of directors. is not a reasonable cause for removal; and their decision will not be interfered with, unless a clear case of fraud on their part can be established. (c)<sup>1</sup>

One of the most important rights of shareholders is to inspect the books and accounts of the company, and to have them examined and reported upon by competent persons. This subject, however, will be alluded to hereafter. (d) Inspection of books, &c., by shareholders.

Individual shareholders, being comparatively powerless, provision is generally made for bringing them together at meetings, and it is not a little important that the right Meetings of shareholders. to convene them should to some extent, at all events, be exercisable by the shareholders themselves. It is however, to be observed that, where those who have the right to call a meeting of the shareholders refuse to exercise that right, for the express purpose of preventing the shareholders from duly assembling, the court will, if necessary, interfere to protect the shareholders against an abuse of power on

(a) See *infra*, book iii. ch. 10, § 3.

(b) *Spurgin v. White*, 2 Giff. 473, is an instance.

(c) *Indarwick v. Snell*, 2 Mc. & G. 216. See as to becoming bankrupt, *Phelps v. Lyle*, 10 A. E. 113; absconding from creditors, *Wilson v. Wilson*, 6 Scott, 540.

<sup>1</sup> By the articles of a voluntary joint-stock association, seven trustees were to be elected, and any vacancy, occurring by death, resignation, or otherwise, was to be filled at the annual meeting. After the trustees were elected, and acted as such, A, one of the seven, re-

signed. Notice of a special meeting for an election of trustees was given, and a meeting held, at which B, one of the seven, voted for seven trustees, and seven were chosen, displacing B. The trustees elected excluded B from the management of the affairs of the company, whereupon he brought a bill for an account and dissolution of the partnership: *Held*, that by acting at the election, and voting for seven trustees, B had not resigned, and that he was still a trustee. *Berry v. Cross*, 3 Sandf. Ch. 1.

(d) See book iii. ch. 8, § 2.

the part of those entrusted with the management of the affairs of the company. (*e*)

In order that a resolution come to at any meeting, whether of directors or of shareholders, may have any legal effect, it is necessary that the meeting shall be duly convened, that a proper number of persons shall be present (*f*), and there must always be two at least (*g*), that the resolution should relate to a matter which the meeting is competent to pass a resolution upon, and that the resolution should be duly passed.

As a general rule, a meeting is not duly convened unless every person entitled to attend has notice of the time and place at which, and purposes for which it is to be held, so that he may exercise his own judgment whether he will attend or not (*h*)<sup>1</sup> and there are numerous cases in which resolutions have been held invalid on the ground that insufficient notice was given of an intention to submit the matters to which they relate to the meeting at which they were passed. (*i*)

But a notice may be good in part and bad in part, and is not wholly invalid because it extends to something which cannot be done. (*k*)

A person who attends a meeting cannot dispute the validity of what is done on the ground that he had not due notice of the time and place at which the meeting was about to be held; and if all entitled to notice have it in fact, but not in the precise form in which it ought to have been given them, the proceedings of the meeting will not necessarily be invalid. (*l*) But still it is absolutely requisite for the protection of those who are to be affected by the

resolutions of others, that such resolutions shall have no effect unless all entitled to a voice in making them had an opportunity of expressing their views. In a case where directors were empowered to meet once a week at their office, without notice or summons, but on and at such day

(*e*) See *Foss v. Harbottle*, 2 Ha. 461. The occasions on which the court will interfere to control the management of the affairs of a company will be examined hereafter.

(*f*) See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151.

(*g*) *Sharp v. Dawes*, 2 Q. B. D. 26.

(*h*) *R. v. Langhorn*, 4 A. & E. 538.

<sup>1</sup> See, generally, as to notice, Ang. & Ames on Corp. § 487, *et seq.*

(*i*) A leading case on this head is *Bridport Old Brewery Co.* 2 Ch. 191.

(*k*) *Cleve v. Financial Corporation*, 16 Eq. 363.

(*l*) See *British Sugar Refining Co.* 3. K & J. 408.

and hour as they should from time to time agree upon, it was held that a resolution come to by a *quorum* assembled without notice was invalid, inasmuch as no day or hour for the meeting of the directors had ever been fixed. (*m*)

The mode in which notice is to be given varies with almost every company. Such statutory enactments as exist upon the subject will be noticed hereafter. The only Mode of giving notices of meetings. general rule which can be laid down is, that notice must be given in the manner prescribed by each company's act, charter, deed of settlement, or regulations. It seems that it is not necessary to give notice of the holding of an adjourned meeting to the persons entitled to attend it; it is apparently sufficient if they had notice of the holding of the original meeting. (*n*) But nothing can, without notice, be transacted at an adjourned meeting except the unfinished business of the first meeting. (*o*)<sup>1</sup>

There are two kinds of meetings, viz., *ordinary* and *extraordinary*, or, as they are sometimes called, *general* and *special*.<sup>2</sup> Ordinary or general meetings are usually held at stated times, \*and for the transaction of bus- \*547 iness generally. Extraordinary or special meetings are held as occasion may require, for the transaction of some particular business, which ought to be specified in the notice convening the meeting. A resolution passed at an extraordinary meeting, upon a matter for the consideration of which it was not avowedly called, or which was not specified in the notice convening the meeting, is altogether inoperative (*p*); and although such resolution may have been confirmed at a subsequent ordinary meeting, it will still be invalid unless it might have been properly passed in the first instance at an ordinary meeting, without previous notice of any intention to enter upon the matter to which the resolution relates (*q*): and if a meeting is convened to

Ordinary and extraordinary meetings.

Nature of business should be specified.

(*m*) *Moore v. Hammond*, 6 B. & C. 456.

(*n*) See *Wills v. Murray*, 4 Ex. 843, 862.

(*o*) *R. v. Grimshaw*, 10 Q. B. 747.

<sup>1</sup> As to what business may be done at a meeting. See Ang. & Ames on Corp. § 488, *et seq.*

<sup>2</sup> See Ang. & Ames on Corp. 487, *et*

*seq.*

(*p*) *Bridport Old Brewery Co.* 2 Ch. 191; *Imp. Bank of China v. Bank of Hindustan*, 6 Eq. 91; *Anglo-Californian Gold Mining Co. v. Lewis*, 6 H. & N. 174; *Stearic Acid Co.* 9 Jur. N. S. 1066, V.-C. K.

(*q*) *Lawes' case*, 1 DeG. M. & G. 421

confirm resolutions previously passed, the notice ought to state those resolutions or their effect. (*r*)

One and the same meeting may be both ordinary and extraordinary; ordinary for the purpose of transacting the usual business of the company, and extraordinary for the transaction of some particular business of which special notice may have been given. (*s*) If an ordinary meeting is held and adjourned the adjourned meeting continues to be an ordinary meeting, although special notice is given that it is about to be held for special business. (*t*)

The power of making by-laws<sup>1</sup> for the regulation of the affairs of a company is not unfrequently reposed in its shareholders; and it is not uncommonly required that all by-laws shall be sealed with the seal of the company. In such a case nothing which is not so sealed can be regarded as a by-law (*u*); nor is an unsealed resolution passed at a meeting of the shareholders of an incorporated company, equivalent to a contract under the seal of such company. (*x*) At the same time it is

\* 548 \* clear that, as a general rule, the resolutions of meetings of members of a body corporate do not require to be sealed in order to be binding on its members, as between themselves, and as members. Acts relating to the internal affairs of a corporation, affecting members only, and affecting them merely as members, do not in general require the common seal to render them valid. (*y*)

By-laws not warranted by the authority which empowers them to be made are altogether illegal. (*z*)

Where there is no special provision to the contrary, the resolution come to by the majority of those present at a meeting is the resolution of that meeting,<sup>1</sup> and it is not illegal to transfer shares before a meeting so as to multiply votes at it. (*a*) A meeting at which there is not present

(*r*) *Dean v. Bennett*, 6 Ch. 489 and 9 Eq. 625.

(*s*) See *Cutbill v. Kingdom*, 1 Ex. 494; *Graham v. Van Diemen's Land Co.* 1 H. & N. 541.

(*t*) *Wills v. Murray*, 4 Ex. 843.

<sup>1</sup> See, generally, Ang. & Ames on Corp. Chap. X.

(*u*) *Dunston v. Imperial Gas Co.* 3 B. & Ad. 125.

(*x*) *Ibid.* and see *ante*, pp. 352, 353.

(*y*) *Grant on Corp.* 65.

(*z*) See *Calder, &c. v. Nav. Co.* *v. Pill- ing*, 14 M. & W. 76, *Adley v. Whitstable Co.* 17 Ves. 315, 19 ib. 304, and 1 Mer. 107.

<sup>1</sup> See, generally, Ang. & Ames on Corp. § 499, *et seq.*

(*a*) *Pender v. Lushington*, 6 Ch. D. 70; *Stranton Iron and Steel Co.* 16 Eq. 559.

a sufficient number of persons to transact business, cannot pass any valid resolution. (*b*)

It is conceived that an agreement to vote in a particular way, in consideration of some personal benefit, is illegal; for a vote ought to be an impartial and honest exercise of <sup>Interested votes.</sup> judgment. (*c*) But as a matter of law as distinguished from conscience, a person may vote on a question in which he happens to have a personal interest opposed to that of the company; and where the question was whether proceedings should be taken by the company to impeach the title of some of the shareholders in it, those shareholders were held entitled to vote in respect of the very shares the title to which was disputed. (*d*)

\* Absent members are not entitled to vote by proxy unless <sup>\*549</sup> they are specially empowered so to do. (*e*)<sup>1</sup> Where voting by proxy is allowed, the appointment of a proxy to <sup>Proxies.</sup> vote at one meeting must bear a penny stamp (*f*); and the appointment must specify the day upon which the meeting at which it is intended to be used is to be held; and the proxy is available only at the meeting so specified, or an adjournment thereof. (*g*) If the appointment authorizes the proxy to at more than one meeting, the proxy paper will require a ten shilling instead of a penny stamp. (*h*) Every person who makes or executes, or votes or attempts to vote by means of a voting paper not duly stamped incurs a penalty of 50*l.*, and his vote is absolutely void. (*i*)

(*b*) *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Sharp v. Dawes*, 2 Q. B. D. 26.

(*c*) See *Elliott v. Richardson*, L. R. 5 C. P. 744, where the agreement was held illegal as opposed to the policy of the Companies act, 1862. See, further, *Moffatt v. Farquharson*, 2 Bro. C. C. 338; *Card v. Hope*, 2 B. & Cr. 661. Compare *Bolton v. Madden*, L. R. 9 Q. B. 55, where an agreement between two subscribers to a charity to vote for each other's nominees was held not to be illegal.

(*d*) *East Pant Du Mining Co. v. Merryweather*, 2 Hem. & M. 254. See, also, *Menier v. Hooper's Telegraph Works*, 9 Ch. 350. Compare *Atwool v. Merryweather*, 5 Eq. 464, note, and see

8 & 9 Vict. c. 16, §§ 85 and 86, and the Companies act, 1862, Table A, No. 57, as to votes by directors on matters in which they are interested.

(*e*) See *Grant on Corporations*, 256, note (*g*); *Com. Dig. Franchise*, F. 11.

<sup>1</sup> *Ang. & Ames on Corp.* § 128.

(*f*) 33 & 34 Vict. c. 97, § 3, and Schedule; 34 Vict. c. 4.

(*g*) 33 & 34 Vict. c. 97, § 102, pl. 1. See as to filling up a paper signed in blank, *Ex parte Lancaster*, 5 Ch. D. 911.

(*h*) 33 & 34 Vict. c. 97, § 3 and Schedule. As to stamps on proxies under the older stamp laws, see *R. v. Kelk*, 12 A. & E. 559; *Monmouthshire Canal Co. v. Kendall*, 4 B. & Al. 453; *Trinity House of Hull v. Beadle*, 13 Q. B. 175.

(*i*) 33 & 34 Vict. c. 97, § 102, pl. 3.

The right of a married woman or of her husband to vote in respect of shares held by her has not been judicially considered. Speaking generally, however, and without reference to the regulations of any particular company, it would seem that if the shares belong to her as part of her separate estate, her husband has no right to vote in respect of them, and her vote is valid notwithstanding his disapproval thereof. But if the shares do not form part of her separate estate, she alone cannot in point of law be a member in respect of them, and cannot therefore vote (*k*); nor is her husband entitled to vote in respect of such shares until he has become a member of the company in respect of them. Nor does it follow from the fact that he is subject to liabilities in respect of his wife's shares, that he is entitled to the privilege of voting in respect of them.

The right of a shareholder to demand a poll has not been decided; but the right would probably be held to exist unless the contrary could be shown. (*l*)

\*550 *Absentees cannot effectually urge their ignorance of what took place at meetings which they might have attended had they thought proper so to do: and they are bound by the resolutions come to at a duly convened meeting, provided such resolutions relate to matters upon which the meeting was competent to decide. (m)* Moreover, shareholders who receive reports of what takes place at meetings, and who do not object to what is being done, will be considered as acquiescing therein if what is done might have been validly sanctioned by them if present; but not if what is done is altogether illegal, and beyond the power of even all the shareholders. (*n*)

The limits of the power of a majority will be examined hereafter.

(*k*) See *R. v. Harrauld*, L. R. 7 Q. B. 361.

(*l*) See *Grant on Corp.* 203; *Campbell v. Maund*, 5 A. & E. 865. If no poll is taken when rightfully demanded the election is void; *R. v. Cooper*, L. R. 5 Q. B. 457. As to demanding a poll on a question of adjournment, see *Macdougall v. Gardiner*, 1 Ch. D. 13.

(*m*) *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Evans v. Smallcombe*,

L. R. 3 H. L. 249; *Turquand v. Marshall*, 4 Ch. 376; *Norwich Yarn Co. 22 Beav.* 165.

(*n*) See *Phoenix Life Assur. Co.'s case*, 2 J. & H. 441; *Irvine v. Union Bank of Australia*, 2 App. Ca. 366. Compare *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Spackman v. Evans*, ib. 171; *Houldsworth v. Evans*, ib. 263; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43.

Minutes of meetings, and the contents of books kept by the officers of a company, are not, as against third persons, evidence for the company, unless expressly made so by <sup>Minutes of meetings.</sup> Act of Parliament. (o) Partnership books are, as a rule, evidence against every partner, because every partner is entitled not only to see them, but, in conjunction with his co-partners, to determine what shall be inserted and what not; but this is not the case with shareholders of companies, and consequently unless there is some statutory enactment or agreement to the contrary, the books of a company are no more evidence against ordinary members of the company than they are as against strangers. (o) The inconvenience resulting from this principle is obviated in modern acts of Parliament by making certain things, *e. g.*, the registers of shareholders, and signed minutes of meetings, *prima facie* evidence as well against shareholders as against strangers.

\* Shareholders are not, as between themselves and their directors, supposed to know all that is in the company's books. (p) \*551

With respect to minutes of meetings, it is usual for acts of Parliament to require that the minutes of every meeting shall be entered in a book, and be signed by the chairman of the meeting, and to declare that the minutes so entered and signed shall be admissible in evidence in courts of justice. In practice, the minutes of a meeting are commonly made up and entered by the secretary after the meeting is over, and the chairman signs such minutes at a subsequent period (generally the next meeting). It has been frequently urged that a resolution made at a meeting, the minutes of which were entered and signed after the meeting was over, could not, by such minutes, be proved to have been made. But this objection has always been overruled, even where the minutes of each meeting ought in strictness to have been signed at such meeting. (q) But where a company brought an

(o) *Hill v. Manchester Waterworks Co.* 5 B. & Ad. 866. Compare *Alderson v. Clay*, 1 Stark, 405, and *The Thetford case*, 12 Vin. Ab. 90, pl. 16; *Maguire's case*, 3 DeG. & S. 31. See, also, the next note.

(p) See *Longworth's case*, 1 DeG. F. & J. pp. 27 and 32. See, too, *per Lord J. Turner*, in *Stewart's case*, 1 Ch. 587.

(q) *Miles v. Bough*, 3 Q. B. 845; *Southampton Dock Co. v. Richards*, 1 Man. & Gr. 448; *West London Rail. Co. v. Bernard*, 3 Q. B. 873; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 675; *Inglis v. Great Northern Rail. Co.* 1 McQueen, 112. See, also, *Roney's case*, 4 DeG. J. & Sm. 426, which shows that those who sign min-

action for calls, and the evidence of the making of the calls consisted of minutes which were signed after the commencement of the action, it was held that such minutes were not admissible. (*r*)

The maxim *omnia præsumuntur rite esse acta* is applicable to the proceedings at meetings; and if minutes of such proceedings are not produced it will be presumed against the company, and in favor of all persons dealing *bonâ fide* with its directors, not only that every resolution proved to have been made was duly passed, but also that all such resolutions and steps were made and taken as were necessary to authorize subsequent acts proved to have been done. (*s*) But this presumption will not be made in favor of directors and against the shareholders; and a transaction with directors which is invalid if not assented to by the shareholders must, if relied on by the directors, be proved by them to have been brought to the attention of the shareholders, and to have received their sanction. (*t*)

A resolution of a meeting is not an agreement, and does not require an agreement stamp. (*u*)

Having made these general observations on directors and shareholders, it is proposed to examine the various statutory provisions now in force relating to their powers and duties in particular companies.

There are no statutory provisions which affect the constitution of the managing bodies, or the powers of the shareholders of companies governed by the Banking act of 7 Geo. 4, c. 46; or by the Letters Patent act of 7 Wm. 4 & 1 Vict. c. 73. But the enactments affecting the management of the affairs of companies governed by the Companies clauses consolidation act, 8 & 9 Vict. c. 16; and the Companies act, 1862, are numerous and important, and require special notice. (*x*)

utes are treated as admitting their truth.

(*r*) Cornwall great Consolidated Mining Co. 5 H. & N. 423.

(*s*) See Lane's case, 1 DeG. J. & Sm. 504; Grady's case, ib. 488; Stanhope's case, 1 Ch. 161; Knight's case, 2 Ch. 321.

(*t*) See British Provident Assur. Soc. v. Norton, 3 N. R. 147, V.-C. K.

(*u*) Mills v. British Provident Assur-

ance Society, 1 Fos. & Fin. 607.

(*x*) Questions on the repealed acts, 7 & 8 Vict. cc. 110 and 113, and the Joint-stock companies acts, 1856-58, may still arise, but it has not been thought worth while to retain those parts of the first edition of this treatise which related to such companies. When necessary recourse can be had to that edition for information on these matters.

*Companies governed by 8 & 9 Vict. c. 16.**First, as to the managing body.*

The Companies clauses consolidation act contains several important provisions relating to the appointment, rotation, powers and proceedings of directors of the companies to which the act applies. (y) The special act of such a company is supposed to fix the number of its directors, and this number cannot be varied except within such limits as may be thereby allowed. (z) A certain number of the directors are required to retire from office in rotation every year, so that all the \*directors may be changed every three years; the persons to retire are to be determined by the directors by ballot if they do not otherwise agree; but the persons to take their place are to be elected by the shareholders. (a) Occasional vacancies are to be supplied by the directors themselves. (b) In order that a person may be eligible as a director he must be a shareholder, and hold as many shares as may be required by the company's special act. (c) Moreover, it is expressly declared that no person holding an office or place of trust or profit under the company, or interested in any contract with the company, is capable of being a director (d); and that if any director accepts or holds any other office or place of trust or profit under the company, or is directly or indirectly concerned in any contract with the company, or participates in the profits of any work to be done for it, or ceases to be the holder of the prescribed number of shares, then his office shall become vacant, and he shall cease from voting or acting as a director. (e) But an exception is made as regards a director whose only interest in a contract with the company arises from his having shares in another company with which such contract is made. (f)

1. Directors of companies governed by 8 & 9 Vict. c. 16.

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These provisions do not, like the similar clauses of the repealed act of 7 & 8 Vict. c. 110 (g), render void a contract made between a director and the company, unless such

Contracts between directors and company.

(y) See 8 & 9 Vict. c. 16, §§ 81 to 100.

(c) *Ib.* § 84.

(z) *Ib.* §§ 81, 82. See on the construction of such acts, *Portal v. Emmens*, 1 C. P. D. 201 and cases there cited.

(d) *Ib.* § 85.

(e) *Ib.* § 86.

(f) *Ib.* § 87.

(a) 8 & 9 Vict. c. 16, §§ 88, 83, 84.

(g) See 7 & 8 Vict. c. 110, § 29. The following decisions upon that section

(b) *Ib.* § 89.

contract is confirmed by the shareholders; and it was held in *Foster v. The Oxford Railway Company* (*h*), that under the act 8 & 9 Vict. c. 16, such a contract was not void.

*Foster v. Oxford Railway Company.*

\*554

But it \*must not be forgotten that, although the act does not expressly invalidate contracts of this description, there is a well-established equitable principle which precludes any person whose duty it is to take care of others, from binding them by any bargain entered into on their behalf with himself, unless all the circumstances relating to such bargain are fully and clearly explained to them. (*i*)

With respect to the nature of the contracts which disqualify a person interested in them from being a director, it has been held, that they must be contracts made with the company in the prosecution of its undertaking; and that there is nothing to prevent a banker of a company from being one of its directors. (*k*)

To return to the act. The directors have the management of the affairs of the company, with the exception of such as are required to be transacted by a general meeting. (*l*) They are subject to the control of a general meeting specially convened for the purpose, but no resolution of any such meeting renders invalid what may have been done before the resolution passed. (*m*) The directors are required to hold meetings at such times as they shall appoint, and they are empowered to ad-

may be usefully referred to. *Ernest v. Nicholls*, 6 H. L. C. 401; *Curteis v. Anchor Insur. Co.* 2 H. & N. 537; *Poole v. National, &c. Assur. Society*, ib. 687; *Stear's case*, Johns. 480; *Stears v. South Essex Gas Co.* 9 C. B. N. S. 180. See as to the purchase of shares by directors. *Hodgkinson v. Nat. Live Stock Insur. Co.* 26 Beav. 473, and 4 DeG. & J. 422; *Lane's case*, 1 DeG. J. & S. 504; and as to loans, *Teversham v. Cameron's, &c. Rail. Co.* 3 DeG. & S. 296; *Murray's executors' case*, 5 DeG. M. & G. 746; *Baker's case*, 1 Dr. & Sm. 55; *Bluck v. Mallaloe*, 27 Beav. 398; *British Prov. Ass. Society v. Norton*, 3 N. R.

147; *Paul and Beresford's case*, 33 Beav. 204.

(*h*) 13 C. B. 200. It is submitted that this case can no longer be relied upon. See *infra*, Ch. 2, § 22, duties of directors.

(*i*) See *infra*, Ch. 2, § 2, duties of directors.

(*k*) *Sheffield and Manchester Rail. Co. v. Woodcock*, 7 M. & W. 574. The cases referred to above, in note (*g*), may be usefully consulted on this head. See, also, *Lewis v. Carr*, 1 Ex. D. 484.

(*l*) 8 & 9 Vict. c. 16, § 90. See, as to this, § 91, and *infra*, p. 557.

(*m*) 8 & 9 Vict. c. 16, § 90.

journal such meetings as they may think proper. (*n*) Any two directors may require a meeting of directors to be called. (*n*) One-third of the whole number of directors constitutes a quorum, unless some other quorum is prescribed by the company's special act. (*n*) All questions at any meeting are determined by a majority of votes of the directors present, and, in case of an equality of votes, the chairman has a casting vote. (*n*) A chairman is required to be elected, and the elected chairman continues in office for a year. (*o*) A deputy-chairman may be elected, if the directors think fit, and vacancies in the office of chairman and deputy-chairman are to be filled up. (*p*) In case of the absence at any meeting of the chairman and \*deputy-chairman, the directors present are to \*555 choose one of their number to be a chairman for that meeting. (*q*)

The directors are authorized to delegate their powers to one or more committees. (*r*) Delegation of powers.

The mode in which contracts are to be made on behalf of the company has been already explained. (*s*) Contracts by directors.

The directors are required to cause to be entered in proper books, notes or minutes of all appointments and contracts made by them, and of the orders and proceedings of all meetings of the company, and of the directors and their committees. (*t*) All entries are to be signed by the chairman of the meeting at which they are made, and entries so signed are receivable in evidence without any preliminary proof. (*u*) Duty to keep books, &c.

The proceedings of *de facto* directors are not invalid, although it may afterwards be discovered that there was some defect in their appointment, or that they were disqualified. (*x*) Acts of de facto directors valid.

The directors are not personally liable for what they may lawfully do on behalf of the company, and they are entitled to be indemnified by the company against all costs, charges, and expenses properly incurred by them in the exercise of the powers entrusted to them. (*y*) Indemnity of directors.

(*n*) *Ib.* § 92. See *infra*, note (*r*).

(*o*) 8 & 9 Vict. c. 16, § 93.

(*p*) *Ibid.*

(*q*) 8 & 9 Vict. c. 16, § 94.

(*r*) *Ib.* § § 95, 96. See *D'Arcy v. Tamar Rail. Co.* L. R. 2 Ex. 158, where a bond was sealed without authority.

(*s*) *Ib.* § 97; see *ante*, p. 357.

(*t*) *Ib.* § 98.

(*u*) *Ib.* See as to this, *Miles v. Bough*, 3 Q. B. 845, and other cases noticed *ante*, p. 551.

(*x*) *Ib.* § 99.

(*y*) *Ib.* § 100.

The directors are required to take security from every person entrusted with the custody or control of the moneys of the company (*z*); and they are empowered to demand from every officer employed by the company an account of all moneys received by him on behalf of the company and the delivery up of all receipts and vouchers, and payment of the balance which may appear to be owing from him on such account. (*a*) A summary remedy is provided in case such a demand is not complied with (*b*), and also against any officer believed to be about to abscond without accounting. (*c*)

Duty to take security from subordinate officers.

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\* *Secondly, as to the shareholders.*

Ordinary general meetings of the shareholders are to be held twice a year, viz., in February and August, unless the company's act otherwise directs. (*d*) Extraordinary general meetings may at any time be convened by the directors (*e*); but provision is also made for convening such meetings at the instance of the shareholders. (*f*) In order to constitute a meeting, there must be present, either personally or by proxy, the quorum prescribed by the special act; and where no quorum is prescribed, then shareholders, holding in the aggregate not less than one-twentieth of the capital of the company, and being in number not less than one for every 500*l.* of such required proportion of capital, unless such number would be more than twenty, in which case twenty shareholders, holding not less than one-twentieth of the capital of the company shall be the quorum. (*g*) Every meeting is to be presided over by a chairman, viz., by the chairman of directors, or in his absence, by the deputy-chairman, or in the absence of both, by a director chosen by the meeting, or in the absence of all the directors, by a shareholder similarly chosen. (*h*)

2. Shareholders in companies governed by 8 & 9 Vict. c. 16.

(*z*) *Ib.* § 109. See *Evans v. Coventry*, 8 DeG. M. & G. 835. Decree on appeal, clause 6, as to the effect of not observing such clauses.

(*a*) 8 & 9 Vict. c. 16, § 110.

(*b*) *Ib.* §§ 111, 112.

(*c*) *Ib.* § 113.

(*d*) *Ib.* § 66.

(*e*) *Ib.* § 68.

(*f*) *Ib.* § 70.

(*g*) *Ib.* § 72. For some purposes a less quorum is sufficient, see the section 72.

(*h*) *Ib.* § 73.

Fourteen days' public notice, at least, of all meetings are to be given by advertisement (*i*); and every notice of an extraordinary meeting is to specify the purpose for <sup>Notices of meetings.</sup> which the meeting is called (*k*); and if any matters, except such as are authorized by the legislature to be done at an ordinary meeting, are to be transacted at such meeting, the notice convening that meeting must state what those matters are. (*l*) The shareholders present at any meeting are to proceed with the business to transact which the meeting shall have been convened, and with no other business; and no business is to be transacted at an adjourned meeting except that left unfinished at the first meeting. (*m*)

\* No shareholder is entitled to vote unless all the calls upon <sup>\*557</sup> his shares have been paid (*n*); but with this qualification, and except where the company's special act otherwise provides, every shareholder is entitled to one vote for every <sup>Votes of shareholders.</sup> share he holds up to ten, and to one additional vote for every additional five shares up to one hundred, and to an additional vote for every ten shares beyond the first hundred. (*o*) Voting by proxy is allowed, subject to certain regulations, easily complied with (*p*); and every proposition is determined by a majority of votes, the chairman having the casting vote in case of an equality. (*q*) Where a share is registered in the names of more persons than one, he whose name stands first on the register is to be treated as the shareholder for all purposes of voting. (*r*) Lunatic shareholders are entitled to vote by their committees, and infant shareholders by their guardians. (*s*) In case of a dispute as to whether any resolution has been passed by the required majority, a poll may be demanded; but if no poll is demanded the decision of the chairman is final. (*t*)

The shareholders elect the directors (*u*); but occasional vacancies occurring among them may be filled up by the continuing directors. (*x*) The shareholders also appoint <sup>Election of officers.</sup> the auditors, and determine the remuneration of the directors, auditors, treasurer and secretary, the amount of money to be borrowed

(*i*) Ib. § 71, and see § 133.

(*k*) Ibid.

(*l*) Ib. §§ 67, 71, 133.

(*m*) Ib. § 74, and see §§ 67, 69.

(*n*) 8 & 9 Vict. c. 16, § 75.

(*o*) Ibid.

(*p*) Ib. §§ 76, 77. See *ante*, p. 549.

(*q*) Ib. § 76.

(*r*) Ib. § 78.

(*s*) Ib. § 79.

(*t*) Ib. § 80.

(*u*) Ib. §§ 83, 91.

(*x*) Ib. § 89.

on mortgage, and the extent to which the company's capital may be augmented. (*y*) Dividends, moreover, can only be declared at a general meeting of the shareholders. (*z*)

Other powers  
of sharehold-  
ers.

The shareholders can also, at a meeting specially convened for the purpose, make regulations for the conduct of the directors. (*a*) The power of making by-laws may be exercised by the directors, subject to the control of the shareholders. (*b*)

\*558 \*The company's register of shareholders is to be authenticated by the seal of the company at the ordinary general meetings of shareholders. (*c*)

Sealing regis-  
ter.

Forfeiture of  
shares.

Shares cannot be forfeited for non-payment of calls without the sanction of a general meeting of shareholders. (*d*)

The shareholders have a right to inspect—

Right to in-  
spect books, etc.

1. The shareholders' address book. (*e*)
2. The register of mortgages and bonds. (*f*)
3. The register of consolidated stock. (*g*)
4. The company's books of account. (*h*)
5. The company's special act. (*i*)

They have also a right to have copies of, or of any part of the shareholders' address book, and the company's books of account, and special act. (*k*)

Copies of the company's special act may always be seen by any person interested. (*l*)

### *Companies governed by the Companies' act, 1862.*

The constitution of a company formed under the act of 1862 is determined by its memorandum of association and its articles, to

(*y*) *Ib.* § 91. See, too, as to auditors, §§ 101 and 104, and as to borrowing money, § 38, &c. A company must pay its secretary for his services, although his remuneration may not have been fixed at a general meeting. *Bill v. Darenth, &c. Rail. Co.* 1 H. & N. 305.

(*z*) 8 & 9 Vict. c. 16, § 91.

(*a*) *Ib.* § 90.

(*b*) *Ib.* §§ 90, 124. The by-laws must be under seal. A justice of the peace who is a shareholder cannot convict for a breach of a by-

law. *R. v. Hammond*, 3 N. R. 140. (*c*) 8 & 9 Vict. c. 16, § 9.

(*d*) *Ib.* §§ 31, 32. See *infra*, bk, iii. ch. 5, § 7, as to forfeiture of shares.

(*e*) *Ib.* § 10.

(*f*) *Ib.* § 45.

(*g*) *Ib.* § 63.

(*h*) *Ib.* §§ 117, 119.

(*i*) *Ib.* § 161.

(*k*) *Ib.* §§ 10, 119, 161.

(*l*) *Ib.* § 161. Printed copies can be bought of the Queen's printers.

copies of which the members are entitled. (*m*) Both the memorandum and the articles bind the members as if they had signed and sealed them, and had covenanted to observe their conditions, subject to the provisions of the act. (*n*) The memorandum of association defines the nature and objects of the company, and cannot be altered in these respects, although it may in some others. (*o*) The articles contain regulations \*for the management of the company's affairs, \*559 and may be altered from time to time by a special resolution of the members. (*p*) But neither the articles themselves nor the power of altering them authorizes any alteration of the constitution of the company, as defined by the memorandum of association (*q*); *e. g.*, the issue of preference shares (*r*), or the reduction of capital otherwise than as allowed by the Companies' acts, 1867 and 1877. (*s*)

Constitution of company formed under act.

The constitution of an existing company, registered but not formed under the act of 1862, is determined by the act of Parliament, letters patent, deed of settlement, or other instrument creating or regulating the company. This constitution, so far as it is fixed by act of Parliament or letters patent, is only alterable by the legislature or the Crown, as the case may be (*t*); nor can the members change the constitution of the company in any of those matters which, had it been formed under the act of 1862, would have been unalterable by its members. (*u*) But those regulations which are not contained in any act of Parliament or letters patent, and which, if the company had been formed under the act of 1862, might have been altered by its members, may be altered by a special resolution of the members of an existing company, after its registration under the act. (*x*)

Constitution of existing companies registered under the act.

(*m*) 25 & 26 Vict. c. 89, § 19.

(*n*) *Ib.* §§ 11 and 16.

(*o*) *Ib.* § 12. See, also, as to the liability of the directors, 30 and 31 Vict. c. 131, § 8; as to reducing capital, *ib.* § 9, &c.; as to subdividing shares, *ib.* § 21. See, also, 28 & 29 Vict. c. 78, § 3, which enables certain companies to restrict their objects in order to avail themselves of the privileges of issuing transferable mortgage debentures under that act.

(*p*) § 50. *Sheffield Nickel Co. v. Un-*

*win*, 2 Q. B. D. 214.

(*q*) *Ashbury Rail. Carriage Co. v. Riche*, L. R. 7 H. L. 643, and *ante p.* 251.

(*r*) *Hutton v. Scarborough Hotel Co.* 2 Dr. & Sm. 521.

(*s*) *Hope v. International Financial Soc.* 4 Ch. D. 327.

(*t*) 25 & 26 Vict. c. 89, § 196, cl. 3 and 4.

(*u*) § 196, cl. 6.

(*x*) § 196, and see § 176, as to companies governed by Table B, of the act of 1856.

A comparison of §§ 12 and 196 of the Companies act, 1862, will show that a company once registered under the act as an unlimited company cannot be converted by its shareholders into a limited company; and the writer apprehends that such a change in a company's constitution cannot be made, even with the sanction of the Board of Trade, under § 13. The company would have to be wound up and reformed.

\*560 \*Very little is to be found in the act relating to the powers of directors, or to the internal management of a company's affairs. These matters are for the most part left to be provided for by each company as it may deem proper, and are accordingly dealt with in Table A.

The act of 1862, however, requires that a general meeting of members shall be held once a year at least (*y*), and the amendment act requires that every company formed under the act of 1862, after the 1st of September, 1867, shall hold a general meeting within four months after its memorandum of association is registered. (*z*) Moreover, the act of 1862 enables the members, by a special resolution, the meaning of which is defined (*a*), 1. to alter the constitution and regulations of the company to the extent already pointed out; 2. to appoint inspectors to examine into the affairs of the company (*b*): and 3. to have the company wound up. (*c*) The act, moreover, renders the keeping of proper minutes compulsory, and enacts that, until the contrary is proved, meetings and proceedings, of which minutes shall be properly made, shall be considered as duly convened and transacted, and that all appointments of directors, managers, or liquidators, shall be deemed valid, and that all their acts shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications. (*d*)

For the greater protection of the members of companies the act contains some very important provisions, enabling not only the members (*e*), but also, on their application, the Board of Trade, to appoint inspectors to examine into and report upon the affairs of all companies registered under

Power to change from unlimited to limited.  
Management of company's affairs.  
Provisions of act.  
Examination of company's affairs by inspectors.

(*y*) 25 & 26 Vict. c. 89, § 49.

(*z*) 30 & 31 Vict. c. 131, § 39.

(*a*) 25 & 26 Vict. c. 89, § 51.

(*b*) § 60.

(*c*) §§ 79 and 129. The members of

unregistered companies have not this power, see § 199.

(*d*) 25 & 26 Vict. c. 89, § 67. See *ante*, p. 551.

(*e*) § 60.

the act. (*f*) A copy of the report of the inspectors, sealed with the seal of the company, is also made admissible in any legal proceeding as evidence of their opinion on any matter contained in their report. (*g*)

\*Passing now to the regulations in Table A., \*561 Provisions of Table A. the following rules will be found respecting the managing bodies and the members of companies to which that Table applies.

*First, as regards the managing body.*

The business of the company is to be managed by the directors, and, in case of any vacancy in their body, by those Directors.  
Table A. who continue in office (Table A., Nos. 55 and 56). The powers of the directors are, however, subject not only to the provisions of the act, but also to the company's regulations (*ib.*), which, as before observed, may be altered by special resolution. What is done by *de facto* directors is valid, notwithstanding the subsequent discovery of a defect in their appointment or of their disqualification (No. 71, and § 67 of the act). (*h*)

The directors are the proper persons to make calls (No. 4), forfeit shares (Nos. 17 and 22), and appoint the first auditors (No. 84). But the directors cannot, without the sanction of the members, convert shares into stock (No. 23), increase the capital by issuing new shares (No. 26), or declare dividends (No. 72).

Until directors are appointed the subscribers of the memorandum of association are the directors (Table A., No. 53), and are the persons to determine the number and names Appointment  
of directors. of the first directors (No. 52). This number may afterwards be varied by the members (No. 63). At the first ordinary meeting of the members, after the registration of the company, the whole, and in every subsequent year one-third, of the directors, must retire (No. 58). In case of any dispute as to who shall retire in the first two years after the first, the persons to retire must be determined by ballot (No. 59); but afterwards those who have been

(*f*) §§ 56-59.

(*g*) § 61.

(*h*) See *ante*, p. 543, and *Howbeach Coal Co. v. Teague*, 5 H. & N. 151, where the defect in the appointment of

directors was held not to be cured by a clause of this nature. Compare *Murray v. Bush*, L. R. 6 H. L. 37, which turned on a similar clause in 7 & 8 Vict. c. 110, § 30.

longest in office must retire (No. 59). A retiring director \*562 may be re-elected (No. 60). Vacancies \*occurring by retirement under these provisions must be filled up by the members at the meeting at which the directors retire (No. 61); otherwise the meeting stands adjourned for a week (No. 62); and if the vacancies are not filled up at such adjourned meeting, those directors whose places are not filled up, continue in office for another year (No. 62). Casual vacancies may be filled up by the other directors (No. 64).

A director vacates his office—1. if he holds any other office or place of profit under the company (*i*); 2. if he becomes Disqualifica- bankrupt or insolvent; 3. if he (otherwise than as a tions. member of some other company) is concerned in or participates in the profits of any contract with the company (No. 57). (*k*)

Irrespectively of these provisions, any director may be removed Removal of by a special resolution of the members (No. 65). Directors.

The members fix the remuneration of the directors Their pay (No. 54).

The directors may regulate their own meetings as they think fit (No. 66), but they are bound to keep minutes of their Meetings of proceedings (see § 67 of the act). The directors may Directors. determine what number is to be a quorum (Table A., No. 66), and may elect a chairman and determine the period for which he shall hold office (No. 67). If no chairman is present when a meeting assembles, the directors present must choose one of themselves to be chairman *pro tem.* (No. 67).

Questions arising at any meetings of directors are to be determined by a majority of votes, the chairman having a second or casting vote in case of equality (No. 66).

Any director may at any time summon a meeting of directors (No. 66).

The directors may delegate any of their powers to Delegation committees of themselves (Nos. 61–70). (*l*) of powers.

The directors may at any time convene an extraordinary general meeting of the members (No. 32).

(*i*) The directors may appoint one of themselves to be a manager at a salary, but the person so appointed ceases by the appointment to be a director. *Eales v. Cumberland Black Lead Co.* 6 H. & N.

481. Compare *Iron Ship Coating Co. v. Blunt*, L. R. 3 C. P. 484.

(*k*) See as to this, *ante*, p. 553.

(*l*) See *Totterdell v. Fareham Brick Co.* L. R. 1 C. P. 674.

The directors are bound to keep accounts of the company's stock in trade, receipts and expenditure, assets and liabilities; \*and the members are entitled to \*563 Duties of Directors. inspect these accounts, subject to such restrictions as the members may themselves impose (No. 78). The directors are further bound, once a year, at least, to lay before the members a statement of the company's income and expenditure for the past year (Nos. 79 and 80), and also a balance sheet containing a summary of the assets and liabilities of the company in the form given at the end of Table A. (No. 81). A printed copy of this balance sheet is, moreover, to be sent to each member seven days before the meeting (No. 82).

In addition to these provisions the directors are bound by the act itself, and mostly under penalties, to do various things which it may be useful here to recapitulate, viz :

1. To keep a proper register of members (*m*), and to allow it to be inspected. (*n*)

2. To make out and send to the registrar of joint-stock companies the annual lists required to be sent to him. (*o*)

3. To notify to the registrar all increases or re-distributions of capital and conversions of capital into stock (*p*), and all increases of members where there is no share capital. (*q*)

4. To keep, if there be no share capital, a register of directors, and send a copy of it to the registrar, and notify to him all changes amongst the directors. (*r*)

5. To take care, in the case of limited companies, that the word "limited" appears, and is used as prescribed by the statute. (*s*)

6. To keep, in the case of a limited company, a register of all mortgages or charges affecting its property, and allow such register to be inspected. (*t*)

7. To keep, in the office of a limited banking company, an insurance company and deposit provident or benefit society, the statement required by the act, and to permit such statement to be inspected. (*u*)

(*m*) 25 & 26 Vict. c. 89, § 25

(*n*) § 32.

(*o*) §§ 26, 27, 45, 46.

(*p*) §§ 28-34.

(*q*) § 34.

(*r*) §§ 45 and 46.

(*s*) §§ 41 and 42. See *ante*, p. 366,

note (*f*).

(*t*) § 43. See, also, as to the registration, &c., of debentures issued under the Mortgage debenture act, 1865, 28 & 29 Vict. c. 78, §§ 6-11, 21, 23, 27, 31-33, and 33 & 34 Vict. c. 20, §§ 3 *et seq*

(*u*) § 44.

\*564 \*8. To take care that the company does not carry on business with less than seven members. (*x*)

9. To send copies of all special resolutions to the registrar, and to the members if required. (*y*)

10. To submit to examination by the inspectors appointed by the Board of Trade (*z*), or by a special resolution of the members. (*a*)

The powers of directors, as regards calls, dividends, and the forfeiture of shares, and their duties and liabilities on the winding up of a company, will be pointed out hereafter.

*Secondly, as regards the members.*

The question who are members has been already examined. (*b*)

Members. The original number of members may be increased. (*c*)

Meetings of members. The act requires a general meeting of the members to be held once a year at least (*d*); and all companies formed after 1st September, 1867, must hold a meeting within four months after its memorandum of association is registered. (*e*)

Table A. By the regulations contained in Table A., the first ordinary general meeting is to be held at such time within six months after registration of the company, and at such place as the directors may determine (Nos. 29 and 31). Subsequent ordinary general meetings are to be held, at such time and place as the members may determine; and if they do not fix a time and place, a general meeting shall be held on the first Monday in February in every year, at such place as the directors may determine (Nos. 30 and 31).

An extraordinary general meeting may be convened by the directors whenever they think proper (Nos. 31 and 32); and the directors are bound to call such a meeting whenever required so to do in writing by one-fifth of the members (Nos. 32-34). If the directors fail to comply with such

\*565 requisition, \*the requisitioners, or any other members, being

(*x*) § 48.

(*y*) §§ 53 and 54.

(*z*) § 58.

(*a*) § 60.

(*b*) *Ante*, p. 170 *et seq.*

(*c*) §§ 12 and 34.

(*d*) § 49.

(*e*) 30 & 31 Vict. c. 131, § 39.

one-fifth of the whole, may themselves convene an extraordinary general meeting (No. 34). (*f*)

Seven days' notice at least, specifying the day, place and hour of meeting is to be given to the members, by post or personal service (Nos. 95-97, and § 52 of the act), or in Notice convening meetings. such other way as the members in general meeting may direct (No. 35), but the non-receipt of such notice by any member does not invalidate the proceedings of the meeting (No. 35). Whenever an extraordinary meeting is called, or whenever it is intended at an ordinary meeting to do more than sanction a dividend, or consider the accounts, balance-sheets, and ordinary reports of the directors, the notice convening the meeting must state the general nature of the business to be transacted (Nos. 35 and 36). (*g*)

No business, except the declaration of a dividend, can be transacted at any general meeting, unless a quorum of Resolutions. members is present when the meeting proceeds to business (No. 37). The quorum is ascertained as follows:—If the members of the company do not exceed 10, the quorum is 5; if they exceed 10, one must be added for every 5 additional members up to 50; and one for every 10 additional members after 50, until the quorum amounts to 20, which is in all cases a sufficient number. (Table A. No. 37). (*h*)

If within an hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same Table A. Dissolution of meeting. day in the next week, at the same time and place; and if at such adjourned meeting a quorum is not present, it shall be adjourned *sine die* (Table A. No. 38).

The chairman, (if any) of the board of directors, shall preside as chairman at every general meeting of the members Chairman. (No. 39). If there be no such chairman, or if at any meeting he is not present within a quarter of an hour after the time appointed \*566 for holding the meeting, the members present shall choose one of their number to be chairman (No. 40). (*i*).

(*f*) Where there are no regulations upon this subject any five members may summon meetings, see § 52 of the act.

(*g*) See *ante* pp. 545, 547, and the

cases there cited in note (*p*).

(*h*) See, as to the quorums, *ante*, p. 244.

(*i*) Where there are no regulations to the contrary the members may always

The chairman may, with the consent of the meeting, adjourn it from time to time, and from place to place, but no business can be transacted at any adjourned meeting, except the business left unfinished at the meeting from which the adjournment took place (No. 41). (*k*)

At any general meeting a poll may be demanded by five or more members ; but if no poll is so demanded, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of the proceedings of the company is sufficient evidence of the fact, without proof of the number or proportion of votes recorded for or against the resolution (Nos. 42 and 43).

Where the regulations do not otherwise prescribe, each member is entitled to one vote (*l*), but by the regulations in Table A., every member is entitled to one vote for every share up to ten, and to one additional vote for every 5 additional shares up to 100, and to an additional vote for every 10 shares beyond the first 100 (No. 44.) A lunatic may vote by his committee (No. 41). If several persons are jointly entitled to a share or shares, the person whose name stands first on the register in respect of those shares, and no other person is entitled to vote in respect of them (Table A. No. 46).

No member can vote unless he has paid all his calls (No. 47); and except for the first three months after the registration of the company, no member can vote in respect of any share acquired by transfer, unless he has held it for three months (No. 47).

Votes may be given personally or by proxy (No. 48). (*m*) The proxy must be a member of the company, appointed in writing, signed and attested by one witness at least. (No. 49). An instrument appointing a proxy is only good for a year (No. 50), and it must be left at the company's office three days at least before it can be acted upon (No. 50). A form \*of proxy is given in Table A. (No. 51); it must be duly stamped (*n*).

Minutes of all resolutions and proceedings of general meetings are required to be kept by the act, which moreover makes the minutes of any meeting admissible in evi-

elect their own chairman, see § 52 of the act.

(*k*) As to adjourned meetings, see *ante*, p. 546.

(*l*) 25 & 26 Vict. c. 89, § 52.

(*m*) See *ante*, p. 549.

(*n*) *Ante*, p. 549.

dence, if purporting to be signed by the chairman of that or of the next succeeding meeting. (*o*)

The members have, as has been already mentioned, power to elect (No. 52) and to increase or reduce the number of the directors (No. 63), and to fix their remuneration (No. 54), and by special resolution to remove them (No. 65). Powers of members.

The members are also entitled to see the accounts of the company (No. 78), and to appoint all auditors, except the first (No. 84).

The members, moreover, are entitled by the act,

1. To have copies of the company's memorandum of association and articles. (*p*)

2. To inspect and have copies of the register of members. (*q*)

3. To inspect the register of mortgages required to be kept by limited companies. (*r*)

4. To have copies of all special resolutions. (*s*)

5. To apply to the Board of Trade to appoint inspectors to examine the affairs of the company (*t*), and by special resolution to appoint such inspectors themselves. (*u*)

6. To insist on the company being wound up. (*x*)

7. In addition to these powers, the members are empowered by a special resolution, *i. e.*, a resolution passed by three-fourths, and afterwards confirmed by a majority of members, present in person or by proxy, and entitled to vote (*y*),—to alter the regulations of the company. (*z*) But, except by increasing (*a*) or reducing (*b*) the original capital, or by subdividing the shares (*c*) \*or in certain cases by limiting the objects of the company so as to avail itself of the Mortgage debenture act, 1865 (*d*), or by changing the name of the company (*e*), no de-

Special resolutions.

\*568

(*o*) 25 & 26 Vict. c. 89, § 67.

(*p*) § 19.

(*q*) § 32.

(*r*) § 44.

(*s*) §§ 54 and 19.

(*t*) § 56.

(*u*) § 60.

(*x*) §§ 79 and 129. See, also, 30 & 31 Vict. c. 131, § 40.

(*y*) 25 & 26 Vict. c. 89, § 31. The

resolution must be registered, § 53.

(*z*) § 50.

(*a*) § 12.

(*b*) 30 & 31 Vict. c. 131, § 9, *et seq* and 40 & 41 Vict. c. 26, § 3 *et seq*.

(*c*) 30 & 31 Vict. c. 131, § 21, which only applies to limited companies.

(*d*) 28 & 29 Vict. c. 78, § 3.

(*e*) 25 & 26 Vict. c. 89, § 13.

parture can be made from the memorandum of association (*f*), nor can the regulations of the company be so altered as to change the respective *status* of the members, and to give one class a preference over others (*g*), except as authorized by § 24 of the Companies act, 1867.

(*f*) § 12, *ante*, p. 559.

judgment of Lord Westbury in 11 Jur.

(*g*) See *Hutton v. Scarbro' Hotel Co.*

N. S. 551.

2 Dr. & Sm. 521. See *ib.* 514, and the

## \*CHAPTER II.

\*569

## OF THE GENERAL DUTY OF PARTNERS AND DIRECTORS TO OBSERVE GOOD FAITH, AND NOT TO EXCEED THEIR AUTHORITY.

## SECTION I.—PRELIMINARY REMARKS.

*In societatis contractibus fides exuberet.* (a) The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honor. (b)<sup>1</sup> Thus, if one partner knows more about the state of the partnership accounts than another, and concealing what he knows, enters into an agreement with that other, relative to some matter as to which

High standard  
of honor requi-  
site among  
partners,

(a) Cod. iv. tit. 37, l. 3;

(b) See *Blisset v. Daniel*, 10 Ha. 522, 536.

<sup>1</sup> It is a question to be submitted to the jury where there is evidence to raise it, whether the acts of the majority were in bad faith towards and in wanton violation of the rights of the minority. *Western Stage Co. v. Walker*, 2 Iowa, 504.

Where one partner, who is in sound health is made sole agent of the partnership by another, who is not, and who relies on him wholly for true accounts, and the party thus made agent manages the business at a distance from the other, communicating to him no information, the relation of partners, whatever it may be in general, becomes fiduciary, and the law governing such relations applies. *Brooks v. Martin*, 2 Wall. 70.

In an action against a partnership, if process be served on one partner, and judgment recovered, and execution levied on the partnership property, it is the duty of such partner to give notice of it to his co-partners, and a neglect to do so subjects him to an action. *Devall v. Burbridge*, 6 Watts & S. 529.

Two partners carry on an extensive business, embracing various subjects, and they keep no regular set of books. One of them attends exclusively to the out-door business, makes the contracts and executes notes for the firm of which no regular account is kept. They at length quarrel, and the in-door partner insists upon a dissolution of the partnership, and there is a proposition to buy or sell. The out-door partner in making an estimate of the value of the partnership property for his own guidance in

a knowledge of the state of the accounts is material, such agreement will not be allowed to stand. (c)

This obligation to perfect fairness and good faith, is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists (d);<sup>2</sup> and also to persons who have dissolved partnership but who have not

any proposition he may make or receive, attempts to make out a list of the debts due from the concern, and he estimates them at about one-half what they turn out to be, but it does not appear that he represents them to his co-partner at any amount or that his partner did or would have confided in any representation that he made after making his estimate, he makes an offer to sell or buy at a specific price, and his partner agrees to buy at the price offered; and the contract is executed: *Held*, that under the circumstances the selling partner was bound to the utmost good faith on his part. He was bound not only to disclose truly any information in his possession that might be called for, but if he perceived that the purchasing partner was laboring under incorrect views in reference to the amount of the debt due by the concern, by which he might be misled into too high an offer for the interest to be sold, it was his duty to furnish all the data he might have by which such views might be corrected and the mischief prevented: and in this case he does not appear to have violated his duty. *Sexton v. Sexton*, 9 Grat. 204.

A and B being partners, A, without the consent of B, borrowed money at an extra rate of interest, on the credit of the company, to pay his private debts, and credited the company with the money so applied and the legal interest only: *Held*, that the excess of interest thus paid by the company beyond the amount credited to the company was

a proper charge against A. *Tomlinson v. Ward*, 2 Conn. 396.

Where one member of a co-partnership made a promise to another firm having dealings and open accounts with his firm, in which he individually had an interest adverse to that of his firm, that, upon closing the accounts, certain concessions would be made by his firm favorable to the other parties: *Held*, that such promise, being made without the knowledge of his co-partners, and made clearly in his own interest, and to the pecuniary prejudice of his co-partners, was not binding upon them; it appearing that the accounts had been regularly rendered, and the charges made in the accounts were the same as those against other dealers with the firm. *Goodwin v. Einstein*, 51 How. Fr. 9.

(c) See *Maddeford v. Austwick*, 1 Sim. 89.

(d) See *Hichens v. Congreve*, 1 R. & M. 150; *Fawcett v. Whitehouse*, ib. 132, noticed with other cases, *infra*.

<sup>2</sup> It is not contrary to equity for partners in an existing firm, upon taking in a new member, to put in the stock and machinery of the old business, at a price fixed arbitrarily between the parties, as one of the conditions of the new arrangement. There is no confidential relation between parties until the partnership is formed. In the negotiations concerning it the parties deal as strangers. *Uhler v. Semple*, 20 N. J. Eq. 288.

See *post*, 579.

completely wound up and settled the partnership affairs (e);<sup>3</sup> and most especially is good faith required to be observed when one \*partner is endeavor- \*570 ing to get rid of another, or to buy him out. (f) and among those who have ceased to be partners.

(e) See *Lees v. Laforest*, 14 Beav. 250; *Clegg v. Fishwick*, 1 Mac. & G. 294; *Perens v. Johnson*, 3 Sm. & G. 419; *Clements v. Hall*, 2 DeG. & J. 173.

<sup>3</sup>After a dissolution of co-partnership, each partner becomes a trustee for the others as to the partnership funds in his hands, in order to effect a fair settlement and just distribution of the effects, and he will not be allowed to make a bargain with his former co-partners advantageous to himself; but before dissolution no such relationship exists. *Stephens v. Orman*, 10 Fla. 9.

If partners, during the existence of the partnership, are trustees for each other, that relation certainly ceases when the firm is dissolved and the business is closed. *Pierce v. McClellan*, 93 Ill. 245.

In *Farman v. Brooks*, 9 Rich. 212, it was held that a settlement, by an insurance broker, with the administrators of his former principal or partner, will be sustained, if it is not actually or constructively fraudulent, although advantageous to the party; in this he differs from one who is strictly a trustee, such as one being scarcely allowed to purchase at all of his *cestui que trust*.

Where one of two co-partners sold out his interest in the co-partnership assets to the other, taking back an agreement that the purchaser would pay the partnership debts, and the latter, instead of paying them, caused them to be brought up in the name of a confederate, and judgment to be obtained thereon, on which the lands of the other co-partners were sold to such confederate: *Held*, that those sales should be set aside as fraudulent, and void on behalf of one to whom the owner had conveyed the lands, and that it was not necessary for

the complainant to show that he had purchased and paid a valuable consideration for the lands. *Reed v. Wessel*, 7 Mich. 139.

M. and A. formed a partnership to set up a flour mill in W. and bought machinery for it, but abandoned the project, and agreed that A. should take the property at cost, provided he used it in business in W. He gave up entering into business, sold the property and rendered an account, accounting for a sale of an engine and boiler at \$4,000; whereas he had sold them to P. to resell and divide the profits, which P. did for \$5,250, and divided the profits: *Held*, that A. was M.'s trustee, and must account for the profits of the resale. *Mathewson v. Allen*, 10 R. I. 156.

After the dissolution of a firm, one of its members cannot act as the agent of a creditor of the firm, in holding obligations due the firm, as collateral security for a note due from the firm to such creditor, and taking a conveyance of land in settlement of such an obligation; and, in such a case, the creditor, in an action on the firm note, is not bound to account for the value of such land, or of such alleged collaterals, where it appears they were never in his possession, that he never authorized such alleged agent to hold them for him, and never received any payments thereon, and that the land was not conveyed to him, but to such alleged agent. *Pray v. Morse*, 41 Wis. 343.

(f) *Blisset v. Daniel*, 10 Ha. 493; *Maddeford v. Austwick*, 1 Sim. 89; *Perens v. Johnson*, 3 Sm. & G. 419; *Chandler v. Dorsett*, Finch, 431. As to withholding information, see *McLure v. Ripley*, 2 Mac. & G. 274.

Notwithstanding the universal application to partners of the rule requiring the most perfect good faith, if one partner repudiates the contract of partnership and will not perform his duty towards his co-partners, he cannot justly complain if they in return decline to treat him on a footing of equality with themselves. (*g*) As observed by Lord Eldon in *Const v. Harris*: "A partner who complains that the other partners do not do their duty towards him, must be ready at all times and offer himself to do his duty towards them." (*h*) But if a partner has been set at defiance by his co-partners; if they have denied that he is a partner, and that he has any right to interfere in the partnership, they can derive no advantage from the circumstance that he has not performed his duty to them. (*i*) This subject will be further adverted to in that part of the work which relates to the defenses to actions between partners.

The same obligation to good faith which exists on the part of every member of an ordinary firm, exists also on the part of every member of a company; but, in this latter case, the obligation of each member towards the others is qualified by the comparatively small right of personal intervention in the affairs of the company which each member enjoys. (*k*) It is part of the contract into which the members of a company enter, that the management of its concern shall be confided to a few chosen individuals. But whilst this contract limits the right of each member of the company to interfere in the conduct of its affairs, and limits his obligation to exert himself for the benefit of the company, it, if possible, increases the obligation of the directors to observe good faith towards the great body of shareholders, to attend diligently to their interests, and to act within the limits of the authority conferred by them. Directors are not only agents, but to a certain extent trustees. The duty of directors to shareholders is so to conduct the business of the company, as to obtain for the benefit of the shareholders the greatest advantages that can be obtained consistently with the trust reposed in them by the shareholders and with honesty to other people. Directors should remember that they are not

(*g*) See *McLure v. Ripley*, 2 Mac. & G. 274; *Reilly v. Walsh*, 11 Ir. Eq. 22.

(*h*) *Turn. & R.* 524.

(*i*) See *Dale v. Hamilton*, 2 Ph. 276.

(*k*) As to voting on questions on which interests are conflicting, see *ante*, p. 548.

the masters but the servants of the shareholders; and although it is true that the directors have more power, both for good and for evil, than is possessed by the shareholders individually, still that power is limited, and accompanied by a trust, and is to be exercised *bonâ fide* for the purposes for which it was given, and in the manner contemplated by those who gave it. (L)

The foregoing general principles may be regarded as the basis of the law of partnership, so far as it relates to the rights and obligations of partners as between themselves, and they will be found to be more or less illustrated throughout the whole of the present book. Those cases, however, which more especially relate to the obligation of partners and directors not to benefit themselves at the expense of their co-partners and co-shareholders, to the extent to which promoters of companies and directors are trustees, and to the duties of majorities, require to be specially noticed.

Principle of good faith the basis of the internal law of partnership.

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## SECTION II.—OF THE OBLIGATION OF PARTNERS, PROMOTERS, AND DIRECTORS NOT TO BENEFIT THEMSELVES AT THE EXPENSE OF THEIR CO-PARTNERS AND SHAREHOLDERS.

### 1. *As regards partners.*

Good faith requires that a partner shall never obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people, and in which the firm is in honor and conscience entitled to \*participate;<sup>1</sup> *Semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit.* (m)

No partner allowed to benefit himself at the expense of the firm.

(L) See *infra*, section 3 of this chapter.

(m.) Dig. xvii. tit. 2, *pro socio*, l. 65, § 5.

<sup>1</sup> See *Todd v. Rafferty*, 30 N. J. Eq. 254; *Gray v. Portland Bank*, 3 Mass. 364; *Lockwood v. Beckwith*, 6 Mich. 163; *Anderson v. Whitlock*, 2 Bush,

398; *Lowry v. Cobb*, 9 La. Ann. 592; *Stoughton v. Lynch*, 1 John. Ch. 467; S. C. 2 Id. 209; *Herrick v. Ames*, 8 Bosw. 115; *Eason v. Cherry*, 6 Jones Eq. 261; *Lane v. Carpenter*, 30 Ind. 284; *Scruggs v. Russell*, McCahon, 39; *Bart's Appeal*, 70 Penn. St. 301; *Cour- sen's Appeal*, 79 Id. 220; *Solomon v.*

There are two modes in which, more especially, partners attempt unfairly to acquire gain at the expense of their co-partners, viz., 1, by directly making a profit out of them; and 2, by appropriating to themselves benefits which they ought to have acquired, if at all,

Solomon, 2 Ga. 18, and the cases cited below.

Where there has been an actual breach of the articles of co-partnership by one partner, the act may sometimes be affirmed by the innocent partners who may demand an accounting and a share in whatever benefits the partner breaking the articles, may have derived from their violation. See *Moritz v. Phelps*, 4 E. D. Smith, 135.

It is a general rule of partnership that the partners shall devote their time, labor and skill to the benefit of the firm and not to themselves, and that such partners cannot purchase for their own use articles in which the firm necessarily deals, and if they do so, they do it at the risk of having the same, and the profits arising therefrom, claimed by the firm, as belonging to them. *American Bank Note Co. v. Edson*, 56 Barb. 84; *S. C. 1 Lans. 388*.

One partner will not be allowed to stipulate, clandestinely, for a private advantage or benefit to himself, to the exclusion of his partners, in matters in which he has been dealing on behalf of the firm. And though the articles allow a dissolution at the will of either partner, yet a partner will not be allowed, in equity, to dissolve the firm for the purpose of securing to himself an advantage which he has gained in such dealing; but the other partners may enforce a right to participate in the benefit on contributing to the expense. *McMahon v. McClellan*, 10 W. Va. 419.

The plaintiff and defendant, being part owners of a vessel, of which the defendant, was master, and being jointly concerned in a whaling voyage undertaken by such vessel, the defendant, in the course of the voyage, landed some

prisoners from a privateer, and also saved some articles from a wreck, for each of which services he received a compensation. On his return he settled up the voyage, but without rendering any account of these two items of compensation: *Held*, that the plaintiff recover her proportion of the same in assumpsit. *Fanning v. Chadwick*, 3 Pick. 420.

If two persons agree to divide the profits of a certain transaction, it is fraud for one to receive any commissions thereon from third parties, apart from joint profits. *Dunlop v. Richards*, 2 E. D. Smith, 181.

Evidence that the defendant made \$2,100 during six months that he kept a boarding-house alone, and that the expenses were less and the receipts more than when it was kept by the plaintiff and himself together, was *held* not to be admissible to prove that the plaintiff was guilty of a fraud in returning a less sum as the profits for six months in which it was kept by them together. *Thayer v. Barney*, 12 Minn. 502.

One of two partners is not entitled to share in the fees received by the other as administrator, merely because that other is shown to have intended to share such fees with him. *King v. Whiton*, 15 Wis. 684.

Where a partnership was formed by two individuals for the purpose of cutting and conveying to market pine timber, and all the pine timber upon certain lots of land was purchased, in the name of one member of the firm, for the benefit of the firm, and paid for from the property of the firm, and the contract contained a provision that the timber should be cut and taken from the land by a time specified, which was not

for the common advantage of themselves and others. It will be convenient to advert to each of these modes in turn.

In the first place, then, it may be laid down as a general rule, that one partner is not allowed to derive profit at the expense of the firm from any dealings between him and the partnership, unless it is clearly agreed that he is to have such profit. For example, if a partner is buying or selling for a firm, he cannot sell to it or buy from it at a profit to himself.<sup>2</sup>

1. Deriving profit from dealings with the firm.

Sale to firm.

done, but the owner of the land did not insist upon any forfeiture, but subsequently conveyed the land, for the mere price of the land exclusive of the timber, to the member of the firm with whom the original contract was made: *Held*, that the timber remaining upon the land still continued the property of the firm, and that the avails of timber subsequently cut upon the land by the one who made the purchase, exclusive of expenses, must be accounted for by him as firm assets. *Washburn v. Washburn*, 23 Vt. 577.

A and B entered into a written partnership agreement concerning a herd of cattle furnished by A, and to be cared for by B. A also advanced money for further investment in the enterprise, a portion only of which B used for that purpose. A told B to invest the remainder in "something that would pay, and not let it be idle." B afterwards rented land in his own name, raising crops of wheat and barley, upon which a judgment creditor of B levied. A brought an action to enjoin a sale under the levy, setting forth his partnership with B in the cattle venture, and claimed that the crops levied on were part of the assets raised for and on account of the partnership: *Held*, that the partnership did not extend to the crops raised by B. *Brown v. O'Brien*, 4 Neb. 195.

One of three partners who declines to pay over a sum claimed by each of his other partners, cannot relieve himself

from the payment of interest thereon pending the adjustment of the claim, if it appears that he has meanwhile used the money for his own purposes. *Coddingon v. Idell*, 30 N. J. Eq. 540.

Where a firm whose business was "a general produce business," owned a mortgage on real estate, which real estate itself the firm desired to purchase under the mortgage, and intrusted the subject generally to one of the firm: *Held*, that the legal obligation of the partner intrusted being only to get payment of the mortgage, he might make an arrangement for his own benefit for a third person, without the knowledge of his partners, by which such third person should buy the mortgaged estate, giving him, the intrusted partner, an interest in it; and if the mortgage debt was fully paid by such partner into the firm account, that there was no breach of partnership or other fiduciary relation in the transaction; or *at least*, that no partner could recover from him a share of profits made by a sale of the real estate; all parties alike having been originally engaged in a scheme to get the real estate by depreciating its value through a process of entering judgment for a large nominal amount and by deceiving or "bluffing off" other creditors. *Wheeler v. Sage*, 1 Wall. 518.

<sup>2</sup>See, generally, *Ewell's Evans on Agency*, Chap. III.

Although one partner may sell the property of the firm and give a good title to a third party, he cannot sell to

In *Bentley v. Craven* (n), one of the several partners was employed to purchase goods for the firm. He, unknown to his co-partners, supplied them, at the market price, with goods previously bought by himself when the price was lower, and he so made a considerable profit. But it was held that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made. The Master of the Rolls in deliver-

himself. Such a sale is simply void; no right or interest passes; the legal and equitable title remains as it was before the attempted transfer. *Comstock v. Buchanan*, 57 Barb. 127; *Nelson v. Hayner*, 66 Ill. 487.

Thus, where stock belonging to a partnership was surrendered by one of the partners, without the knowledge or consent of his partner, to the company, he representing to the secretary that he had authority from and the consent of his partner to do so, and procured new scrip to be issued to him in his own name, in lieu thereof: *Held*, that the transfer was fraudulent and void. *Comstock v. Buchanan*, *supra*.

A surviving partner, until the partnership affairs are closed, occupies a trust position as to the estate of his deceased partner, and a purchase by him from the administrator, of the deceased partner's interest in the firm, is subject to the liability of being set aside at the suit of the heirs-at-law, and such purchase cannot be set up as a bar to a bill brought for an accounting of the partnership assets and business. *Kimball v. Lincoln*, 5 Bradw. (Ill.) 316.

If a member of a partnership enters into a transaction in his own behalf, which is within the scope of the partnership business, his co-partner may claim the benefits resulting from it; this right however belongs to the partner alone; third parties cannot avail themselves of it, when no such claim has been asserted, to fix a liability on the

partnership. *Lockwood v. Beckwith*, 6 Mich. 168.

Where a bill is filed by a partner against his co-partner for an account, and one of the partners is appointed receiver, and uses the money received as such by him, on which he makes a profit, the other partner is not entitled to a share of such profits, the money not being held as partner, but as receiver. *Whitesides v. Lafferty*, 3 Humph. 150.

Where a partner fraudulently, without the consent of his co-partners, applies the partnership funds to his private purposes and profit, or invests the same in his own name, and for his own use, his co-partners may, if they can distinctly trace the investment, follow it, and treat it as trust property, held for the benefit of the firm by the partner, or by any person in whose hands it may be, except a *bona fide* purchaser without notice. *Kelley v. Greenleaf*, 3 Story, 93; *Croughton v. Forrest*, 17 Miss. 131.

Profits made by a partner in the purchase and sale of merchandise, in which his co-partners are entitled to share, give them no privilege. *Shropshire v. Russell*, 2 La. Ann. 961.

So, where, after the death of a partner, the survivors, one of whom was the executor of the will of the deceased partner, formed themselves into a new firm, and purchased from themselves the whole of the interest of the deceased at 10 per cent. below its appraised value, to be paid for in four equal installments, in six, twelve, eighteen and twenty-four

ing judgment, observed: "The case is this,—Four partners establish a partnership for refining sugar, one of them is a wholesale grocer, and from his business is peculiarly cognizant with the variations in the sugar-market, and has great skill in buying sugar at a right and proper time for the business. Accordingly the business of selecting and purchasing the sugar for the sugar refinery is entrusted to him. He being the person to buy, it is his duty and business to employ his skill in buying for the sugar refinery at the time he thinks most beneficial. Having according to his skill and knowledge bought sugar at a time when he thought it likely to rise, and it having risen, and the firm being in want of some, he sells his own sugars to the firm without letting the partners know that it was his sugar that was sold." Being the agent for the firm for buying sugars, he sold his own sugars to the \*firm and made a profit, and the firm was held entitled to \*573 that profit accordingly.

In *Dunne v. English* (o), the plaintiff and the defendant had agreed to buy a mine for 50,000*l.*, with a view to re-sell it at a profit. It was ultimately arranged that the de- <sup>Purchase from firm.</sup> defendant should sell it to certain persons for 60,000*l.*, and that the profit of 10,000*l.* should be equally divided between the plaintiff and the defendant. The defendant, how- <sup>Dunne v. English.</sup> ever, in fact sold the mine for much more than 60,000*l.*, to a company in which he himself had a large interest. The plaintiff was held entitled to one-half of the whole profit made by the re-sale.

There was in this case some evidence that the plaintiff knew that the defendant had some interest in the purchase be- <sup>Full disclosure necessary.</sup> yond his share of the known profit of 10,000*l.*; but the plaintiff did not know what that interest was, and the real truth was concealed from him. It was held that the defendant being the plaintiff's partner, and expressly entrusted with the conduct of the sale, was bound fully to disclose the real facts to the plaintiff,

months, without interest or security, the sale was held void. *Nelson v. Hayner*, 66 Ill. 487.

A member of one firm sold coal thereof to another firm of which he was a member, with notice to his partner, and at the full market value: *Held*,

that he was not liable to account for profits received by him as partner in the purchasing firm, although said firm took the coal to fill contracts for delivery at a larger price than they paid for it. *Freck v. Blackiston*, 83 Pa. St. 474.

(o) 18 Eq. 524.

and not having done so, could not exclude him from his share of the profits which the defendant realized by the sale. (*p*)

This case also shows, what indeed is obvious enough without authority, that one partner who authorizes another to sell partnership property at a given price, does not thereby deprive himself of his right to share a higher price if a higher price should be realized. (*q*)

The same principles apply to attempts made by partners to secure for themselves which it is their duty to obtain, if at all, for the firm or company to which they belonged. (*r*)

Thus in *Carter v. Horne* (*s*), the plaintiff and the defendant agreed for the purchase of an estate in moieties between them. The estate was subject to several incumbrances, which were to be discharged out of the purchase money.

The defendant had abatements made to him by some of the incumbrancers of several sums due for interest and otherwise, which they in consideration of services and friendship agreed should be to his own use. However, on a bill brought against him by his co-purchaser for an account of the rents and profits, the Court would not allow the defendant the exclusive benefit of these abatements, but held that he must account for them; the purchase being made for the equal benefit of both parties, and on a mutual trust between them.

It has been decided more than once, that if one partner obtains in his own name, either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, he will not be allowed to treat this renewed lease as his own and as one in which his co-partners have no interest.<sup>1</sup> This was laid down and acted on by Sir Wm. Grant in the celebrated case of *Featherstonhaugh*

(*p*) See, also, *Imp. Merc. Credit Assoc. v. Coleman*, L. R. 6 H. L. 189.

(*q*) See, also, *Parker v. McKenna*, 10 Ch. 96.

(*r*) *Parker v. Hills*, 5 Jur. N. S. 809, is not opposed to these cases, for there the money was paid for a lease which was held to belong to one partner only.

(*s*) 1 Eq. Ab. 7. See, also, *Morison v. Thompson*, L. R. 9 Q. B. 480, as to

the right of a principal to profits made by his agent.

<sup>1</sup>See *Anderson v. Lemon*, 4 Sandf. 552; S. C. 8 N. Y. 236; *Struthers v. Pearce*, 51 N. Y. 357; *Mitchell v. Read*, 61 Barb. 310; S. C. 61 N. Y. 123; *Mitchell v. Read*, 19 Hun, 418.

The fact that the landlord would not have granted the new lease to the other partners or to the firm, is immaterial.

*v. Fenwick* (t), where two partners having obtained in their own names a renewal of the lease of the partnership premises, immediately dissolved the partnership, and sought to exclude the plaintiff, their co-partner, from all interest in the

Featherston-  
haugh v. Fen-  
wick.

*Mitchell v. Reed*, 61 N. Y. 123.

A purchase by one partner of property hired by the partnership, inures to the benefit of all, on payment of their shares of the purchase-money. *Laffan v. Naglee*, 9 Cal. 662.

Thus, where a co-partnership occupies real estate under a lease for years, and one partner, secretly, while the other partner, with his concurrence, is negotiating to buy it for the firm, purchases it for himself, he will be decreed to hold it in trust for the firm. *Anderson v. Lemon*, 8 N. Y. 236.

If a partner take a lease of lands in his own name for the purposes of the partnership, he will be considered in equity a trustee of such lease for himself and his co-partners. But in *Otis v. Sill* (8 Barb. 102), where a lease was taken by one member of a firm in his own name, there being no evidence that it was taken for the firm and with express reference to its business, beyond the fact that the partnership commenced at the date of the lease, and was carried on upon the demised premises, it was held that the lease did not belong to the firm, and it was also held that parol evidence was inadmissible to show that the lease was executed for the benefit of the firm, for the reason that by such evidence it was sought to create a trust in real estate by parol which was prohibited by statute. *Chamberlain v. Chamberlain*, 44 N. Y. Sup'r Ct. (12 Jones & Sp.) 116.

Where one partner during the partnership, negotiates respecting and ob-

tains the exclusive use of a right in which the firm was interested, he will be declared to hold such use in trust for the firm. *Weston v. Ketcham*, 39 N. Y. Superor Ct. 54.

A member of a partnership purchased from one of its employes the patent right in an article of use and value in the firm business, and without disclosing or being asked to disclose the terms upon which he had purchased, offered to sell it, at an advance, to the firm; the firm declined to buy, preferring to pay a royalty for the use of the article, which it did: *Held*, that the rights, if any, which the firm originally had to claim the purchase as for its benefit, could not be insisted on after its dissolution. *American Bank Note Co. v. Edson*, 56 Barb. 84; 1 Lans. 388.

Where one partner expends the partnership funds in the purchase of property in his own name, he will hold the same in trust for the partnership. *Evans v. Gibson*, 29 Mo. 223; *Smith v. Ramsey*, 1 Gilm. 373; *Coder v. Huling*, 27 Pa. St. 84; *Catron v. Shepherd*, 8 Neb. 308; *Phillips v. Crammond*, 2 Wash. C. C. 441.

The rule is the same, even though the purchasing partner takes the title in the name of his wife. *Partridge v. Wells*, 30 N. J. Eq. 176.

C. and S. were in partnership in the business of fattening cattle, C. conducting the sales and receiving the money. About the sixth of April, 1875, C. having a considerable amount of partnership funds in his hands and being about

(t) *Featherstonhaugh v. Fenwick*, 17 Ves. 298. If one partner contracts for a renewal in his own name, the others have no equity to restrain the landlord

from granting the lease to the one partner only. Their remedy is to make the lessee a trustee for the firm, *Alder v. Fouracre*, 3 Swanst. 489.

new lease. The unfair, clandestine conduct of the defendants, did not, however, avail them; for in taking the accounts of the partnership, the new lease was treated as part of the assets of the firm.

*Clegg v. Fishwick* (*u*) is another case to the same effect. There the plaintiff was the administratrix of one of several partners in a coal mine, and she filed a bill, some years after the death of the deceased, against the surviving partners, for an account and a dissolution, and for a declaration that a renewed lease, which had been obtained by the defendants,

to sell all the stock owned by the partnership, purchased a claim against S. for about twenty-five cents on the dollar, and in his settlement with S. sought to apply it against the amount of partnership funds in his hands due S. at its face value. In an action on the claim, *held*, that C. could recover no more than he paid for the claim. *Catron v. Shepherd*, *supra*.

A partner may, however, purchase with his own funds, and outside of the partnership business, a judgment or other evidence of indebtedness against his co-partner, and enforce its collection by a levy upon, and sale of, the interest of the other in the firm assets. *McKenzie v. Dickinson*, 43 Cal. 119.

In order to raise an implied trust in favor of the partnership by a joint purchase of real property, the purchase must have been made at the time with partnership funds, or on partnership responsibility. The payment, incidentally, out of those funds, of an installment due upon an antecedent contract on individual responsibility, does not raise such a trust, or give title to anything but reimbursement. *Wheatly v. Calhoun*, 12 Leigh, 264.

On a sale of partnership land, under an execution against the firm, one partner cannot, by purchasing at such sale, extinguish the title of the other partner. *Farmer v. Samuel*, 4 Litt. 187. See,

however *Baird v. Baird*, 1 Dev. & B. Eq. 524.

A and B being partners, A, under a power of attorney from B, executed a bond for a partnership debt, with warrant of attorney to confess judgment. B afterwards sold land bound by the judgment, and, upon a subsequent dissolution of the partnership, funds were deposited in the hands of A, for payment of the partnership debts, and especially of the bond aforesaid. Judgment was subsequently entered upon the bond, and the land sold by B having been sold upon an execution upon the judgment, A became the purchaser: *Held*, that his purchase must be presumed to have been made with the partnership funds, and that it would inure to the benefit of B's grantee. *Swift v. Dean*, 6 Johns. 522.

Where one partner buys in a paramount or outstanding title to lands of the partnership, the rule is that he buys in behalf of all; and the others, on contributing to the cost, are entitled to the benefit of the purchase. This rule applies in favor of heirs of a deceased partner. *Forrer v. Forrer*, 29 Gratt. 134.

A and B, owning land in partnership, agreed to purchase an outstanding title; A purchased and paid for it, and took the conveyance to himself; B having then done, or advanced for the firm, more than his share, refusing to pay

(*u*) 1 Mac. & G. 294. See, too, *Clements v. Hall*, 2 DeG. & J. 173, and 24 Beav. 333.

might be declared subject in equity to a trust for the benefit of the partnership. A twofold defense was set up, viz., first, that the old partnership ended with the old lease, and that the plaintiff \*could not therefore claim any interest in the new lease; \*575 and secondly, that she had some time before the filing of the bill assigned all the share of the deceased to his children; and that she, therefore, at any rate, had no right to institute proceedings respecting such share. It was, however, held by the Lord Chancellor, first, that the old lease was the foundation for the new one, and that parties interested jointly with others in a lease, could not take the benefit of a renewal to the exclusion of those others; and secondly, that what had been assigned by the plaintiff was the share of the deceased in the partnership, but that such share had never been ascertained; that the plaintiff, as administratrix, was the only person entitled to have the necessary accounts taken in order to ascertain it; that it was not only her right, but her duty to have the estate of the deceased realized; and that the effect of the assignment was merely to constitute her a trustee of the share for the assignees after she had got it in, and not in any way to deprive her of her power to call for a realization of the partnership property.

In both of these cases the renewal of the lease was clandestine. But that is not an essential feature. In the more recent and very important case of *Clegg v. Edmondson* (x), the partnership was at will; the managing partners gave notice of dissolution, and of their intention to renew the old lease for their own benefit. They afterwards did so, the other partners protesting, and there was evidence to show that the landlord objected to renew to any persons except the

Open renewal.

*Clegg v. Edmondson.*

anything: *Held*, that the title taken by A was taken for the partnership; and that B's refusal to pay a part of the purchase-money did not deprive him of the right of having the benefit of the purchase, nor was it evidence of a dissolution of the partnership. *Eakin v. Shumaker*, 12 Tex. 51.

A member of an insolvent firm, while acting as agent for the creditors, in the settlement of the partnership affairs, assisted another party to purchase from

the creditors their claims, together with their rights to certain pledged assets of the firm: *Held*, that the purchase did inure to the benefit of the firm, and that the transaction did not come within the operation of the general rule of equity, that a trustee cannot buy trust property for himself, or act as agent in buying it for another person. *Westcott v. Tyson*, 38 Pa. St. 389.

(x) 8 DeG. Mc. & G. 787.

managing partners. (*y*) It was held, however, that it was not competent for the managing partners thus to acquire for themselves alone the benefit of the renewed lease. (*z*)

The principle, however, which precludes a partner from retaining for himself benefits which he ought to share with his co-partners, is applied to cases in which unfairness and misconduct

are by no means so apparent as in those just cited. \*A high standard of honor requires that no partner shall derive any exclusive advantage by the employment of the partnership property, or by engaging in transactions in rivalry with the firm.

Thus, in *Burton v. Wookey* (*a*), the plaintiff and the defendant were partners as dealers in *lapis calaminaris*. The defendant, who was a shopkeeper, lived near the mines in which the ore was got, and he purchased it of the miners. Instead, however, of paying them with money, he paid them with shop goods, and in his account with the plaintiff charged him as for cash paid to the amount of the selling price of the goods. The plaintiff contended that the price of the ore ought, as between himself and the defendant, to be considered as being the cost price of the goods given in exchange for it, and that the profit made by the exchange ought to be accounted for to the partnership. The Court adopted this view; holding that it was the duty of the defendant to buy the ore at the lowest possible price, and to charge the partnership with no more than he actually gave for the goods bartered for the ore. An account of the profit made by the defendant in his barter of the goods was decreed accordingly.

Again, in *Gardner v. McCutcheon* (*b*), a ship, of which the plaintiffs and the defendant were part-owners and the defendant was master, was employed for the common benefit of all in trading and carrying under charter. The defendant, during the time the ship was thus employed, traded on his own account and made considerable profit.

(*y*) See, as to this, *Fitzgibbon v. Scanlan*, 1 Dow. 269.

(*z*) At the same time relief against them was refused on the ground of laches and delay on the part of the plaintiffs. On this point the case will be noticed hereafter. See book iii. c. 10, § 3.

(*a*) 6 Madd. 367.

(*b*) 4 Beav. 534. See, too, *Benson v. Hathorn*, 1 Y. & C. C. C. 326, and 2 Coll. 309; *Miller v. Mackay*, 31 Beav. 77; *Shallcross v. Oldham*, 2 J. & H. 609; and as to commissions, *Holden v. Webber*, 29 Beav. 117. Compare *Miller v. Mackay*, 34 Beav. 295, where the

It was held that he was bound to account for the profits thus obtained. He was bound to trade to the best of his ability for the joint interest of himself and co-owners; he had no right to employ the partnership property in a private speculation for his own benefit; and \*although he alleged that the profits were made \*577 solely by the employment of his own private capital, and that by custom masters of ships were allowed to trade for their own benefit, the Court declined to recognize any such custom, and considered that the profits had been made by the employment of what was not the defendant's exclusively, and that the plaintiffs had therefore a right to share them.

A partner, moreover, is not allowed in transacting the partnership affairs, to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in position to carry on. Bound to do his best for the firm, he is not at liberty to labor for himself to their detriment; and if his connection with the firm enables him to acquire gain, he cannot appropriate that gain to himself on the pretense that it arose from a separate transaction with which the firm had nothing to do. This is well exemplified by the cases as to renewed leases which have been already referred to (*c*), and by *Russell v. Austwick*, which also shows that the same principles apply wherever there is an agreement to share profits.

Benefits resulting from connection with the firm.

In *Russell v. Austwick* (*d*) several persons agreed to carry on business as carriers between London and Falmouth; *but they expressly stipulated that no partnership should subsist between them*, and that each should have a certain portion of the road over which he was to carry. Business was commenced and carried on by the parties to this agreement under the name of Messrs. Russell & Co., and they were employed to carry bullion from Falmouth and Plymouth to London. On the issue of a new silver coinage by the Bank of England, Austwick, who appears to have been the London agent

Carriers not partners inter se.

*Russell v. Austwick.*

profits were held to belong to him who made them. In *Moffatt v. Farquharson*, 2 Bro. C. C. 338, a part-owner of a ship was held to be exclusively entitled to money paid him for his vote in the appointment of a master. But see, on that case, the note to it in *Mr. Belt's*

edition.

(*c*) *Ante*, p. 574.

(*d*) 1 Sim. 52. See, also, as to benefits derived by one co-owner of a mine from the use of a shaft situate in his own land, but used for the mine, *Clegg v. Clegg*, 3 Giff. 322.

of the carriers, entered into a contract with the Master of the Mint for the carriage of the new coin to towns on the road between London and Falmouth. Shortly afterwards he entered into another contract with the Master of the Mint for the conveyance of more new coin to towns in Middlesex, and the adjoining counties.

\*578 None of these last towns lay on the road \*leading from London to Falmouth, and many of them were only accessible by cross country roads, and in consequence of the increased risk of carriage along these roads, the Mint authorities agreed to pay 7s. 6d. per cent. *for all the coin sent from the Mint*, instead of 5s. per cent., which was the remuneration agreed on in the first contract. Austwick contended that he was entitled to the whole benefit of this second contract, because (except as to the extra 2s. 6d.) it had nothing to do with the carrying business between London and Falmouth; and because, as to the 2s. 6d., that sum, although calculated on all the coin carried, whether under the first or the second agreement, was in fact paid by the Mint in consideration only of the extra risk attending the carriage to the towns specified in the second contract. On the other hand it was contended and held, that the second agreement ought to be considered as made on account of all the persons interested in the first agreement; because, although the common concern had no connection with the provincial roads which were the occasion of the second agreement, yet this agreement was entered into by the officers of the Mint as connected with, and a continuation of, the first agreement, and in confidence of the responsibility of the parties to it.

This case of *Russell v. Austwick* shows how difficult it is for a partner to benefit himself exclusively, by dealings which in honor he ought not to have engaged in except for the common benefit of the firm.

*Lock v. Lynam*, which came before the Court of Chancery in Ireland, affords another instructive example of the application of the same wholesome doctrine. In this case (e) the plaintiff and the defendant had agreed to share the profit and loss arising from contracts taken by the defendant for the supply of meat and bread to Her Majesty's forces in Ireland. Whilst this agreement was in force, the defendant

Distinct  
businesses.

*Lock v. Lynam*.

(e) *Lock v. Lynam*, 4 Ir. Ch. 188.; compare this and the last case with *Miller v. Mackay*, 34 Beav. 295.

entered into secret agreements with other persons to share with them the profit and loss accruing in respect of similar contracts entered into and taken by them. The plaintiff claimed a share in the profits made by the defendant under these secret agreements; \* whilst the defendant contended that he was entitled to retain \*579 them for his own exclusive benefit. The Lord Chancellor observed, that in all cases of this kind the real question was, whether, from the nature of the transaction between the partners, there was any express or implied contract against other dealings of a like character; and that, although there was no engagement not to enter into any other partnership of the same kind, still, it never could have been in the contemplation of either of the parties that one partner should, in his own name or in that of any other person, adopt contracts to the prejudice of the other's interest. A decree was accordingly made directing an inquiry whether, during the period for which any partnership between the plaintiff and the defendant existed, the defendant, either alone or jointly with any other person or persons, separately from the plaintiff, entered into, or was beneficially interested in, any other contract or dealing of the like nature with those in which the plaintiff and the defendant were engaged as partners.

After the decisions to which attention has now been drawn, there can be little doubt that a partner cannot, either openly or secretly, lawfully carry on for his own benefit any business in rivalry with the firm to which he belongs. (f)<sup>1</sup> But it

One partner  
competing  
with firm.

(f) See *Glassington v. Thwaites*, 1 Sim. & Stu. 124; *England v. Curling*, 8 Beav. 129, in which, however, there was something more than mere rivalry.

<sup>1</sup>Equity will enjoin one of several partners in a business enterprise, who, by the partnership contract, has undertaken to superintend and manage the business, from carrying on the same business, at the same place, in a separate establishment, for his sole benefit, even though there be no express covenant restraining him from so doing. *Marshall v. Johnson*, 33 Ga. 500.

A partnership was formed for a commission and warehouse business, the agreement being that one partner should furnish buildings and fixtures,

and the other should keep the books and devote himself, his time and talents to the business. Buildings were furnished and the business prosecuted until these were fully occupied with cotton stored; and the partner who engaged for the buildings declined to supply any more, for an increase of business. The other partner then put up buildings at his own expense, and received cotton in store in them, upon his individual account; he did not, however, at all neglect the partnership stores and business: *Held*, that this was no breach of good faith, nor was his co-partner entitled to share in the profits of the individual store. *Parnell v. Robinson*, 58 Ga. 26.

would neither be convenient, nor logically correct, to apply this doctrine to cases where private interest and duty to others are not brought into conflict; as for example, to the case of a person holding shares in rival companies. No standard of honor, however high, requires the extension of the doctrine to such a case as this, and no decision can be found to warrant such an extension. (*g*)

The same obligation to act with good faith exists between persons who have agreed to become partners;<sup>2</sup> and if one of them, in negotiating for the acquisition of property for the intended firm, receives a bonus or commission, he must account for it to the firm when formed. (*h*) He cannot retain for himself on the ground that it was paid him for personal services rendered to the vendor before any partnership existed. Having obtained the benefit, whilst negotiating for himself and his future partners, he must share such benefit with them. (*i*)

Partnership not yet formed.  
Fawcett v. Whitehouse.

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## 2. *As regards companies.*

### (a) *In process of formation.*

#### *Duties of promoters.*

The principles stated and illustrated in the foregoing pages are peculiarly applicable to transactions which precede the formation of a company. Nothing is more common than for persons to acquire property, to form a company on purpose to buy it, and to conceal their own true position from the company they so form. Such a transaction can never stand. There is nothing to prevent a person from buying property for himself at one price, and afterwards selling the same property to a company or any one else at a higher price; nor in a case of this simple description is the vendor bound to disclose the fact that he is selling at a profit. (*b*) Moreover, there may be a valid sale to

Projectors of company making a profit out of it.

(*g*) As to interfering with persons who are directors of two rival companies, and who promote the interests of one of them to the prejudice of the other, see *Orr v. Glasgow, &c., Rail. Co.* 3 Mac-Qu. 799.

<sup>2</sup>See *ante*, 569, and note.

(*h*) *Fawcett v. Whitehouse*, 1 R. & M. 132.

(*i*) *Ibid.*, and see the cases as to promoters of companies, *infra*.

(*b*) See *Gover's case*, 1 Ch. D. 182, and *per James, L. J.*, in 5 Ch. D. 118.

a company by a person engaged in getting it up (*c*); and there often is great difficulty in determining the true nature of any given transaction (*d*); but once let it be shown that the alleged vendor obtained the property when it was his duty to obtain it for the company, or that he has formed a company to buy property which he desires to sell, and it immediately follows that he cannot, without the fullest disclosure on his part, hold the company to its bargain, or charge the company more than he actually gave.<sup>1</sup>

The cases illustrating this principle are numerous and important, and their details are usually complicated; and the following have been selected for abridgment for the guidance of the reader.

\*In *Hichens v. Congreve* (*e*), a company was formed to work \*581 a mine, and was principally got up by three of the defendants; it was proposed that a lease of the mine should be purchased by the company, and a lease to the company was executed by the owner of the property for 25,000*l*. This sum was accordingly charged to the company, but it afterwards turned out, that 10,000*l* only had been, in fact, paid to the owner for the lease, and that the remaining 15,000*l*. had been distributed amongst the directors. The three principal promoters of the company alleged that the property had been sold to them, on their private account, before the company had come into existence, that 25,000*l* was a fair price for the company to pay for the lease, and that the 15,000*l*. was only a fair profit on a re-sale, the original purchase being entirely at the personal risk of the three. They said that the lease was taken directly to the company,

Company entitled to sums reserved by directors.  
*Hichens v. Congreve.*

(*c*) As in *Paul and Beresford's case*, 33 Beav. 204. See, too, the observations of V.-C. Wigram, in *Foss v. Harbottle*, 2 Ha. 489.

(*d*) As in *Beck v. Kantorowicz*, 3 K. & J. 323, noticed *infra*, p. 581.

<sup>1</sup> The owner of any property may form an association or partnership with others and may sell the property to the company at any price agreed on, provided there be no fraudulent representations made by them, and no such confidential relation arises, as to make them liable to account for any profits realized on such sale. *Densmore Oil Co. v. Densmore*, 64 Penn. St. 43; S. C. 9 Am. Law Reg. (N. S.) 96.

But where persons have formed an association, or are dealing in contemplation of one, then they stand in a confidential relation to each other and to all who may subsequently become members; and they cannot purchase any property and sell it to the company at an advance, without a full disclosure of all the facts. If they do so, the company may compel them to account for the profit. *Densmore Oil Co. v. Densmore*, *supra*. See, also, *Short v. Stevenson*, 63 Penn. St. 95; *Doris v. French*, 4 Hun, 292; S. C. 6 Thomp. & C. 581.

See *Ewell's Evans on Agency*, \*283.

(*e*) 1. R. & M. 150. See, also, *Faw-*

and that the amount of the consideration money was stated to be 25,000*l.*, with the knowledge of the lessor, and merely for the purpose of simplifying the title. But it was admitted that only 10,000*l.* reached the lessor's hands, and that the 15,000*l.* had been divided amongst the defendants. A motion was made that the three principal defendants might be ordered to pay into court such sums, part of the 15,000*l.*, as appeared by their answers to be then in their hands, and an order to that effect was made.

Another and very instructive case is *Beck v. Kantorowicz* (*f*), in which one projector sought to obtain a benefit at the expense of the others, and they all sought to make a profit out of the company. In this case five persons proposed to purchase a mine, and to get up a company to work it. One of them, Kantorowicz, negotiated on behalf of himself and co-adventurers with the owners of the mine, and agreed with the owners for a purchase from them, at a sum of 85,000*l.*, and he represented to his co-adventurers that this sum was the least which the owners would take for the mine. In point of fact, however, there was an agreement between Kantorowicz and the owners, that if the mine was purchased at that price he was to have 20,000*l.* for his trouble; but this was unknown to the other adventurers and to the company which was afterwards formed. Upon the supposition that 85,000*l.* was the price of the mine, a contract for the sale of it at that price was entered into between the owners of the one part, and Kantorowicz and his four co-adventurers of the other. Part of the purchase money was to be paid in shares in the company proposed to be formed. Shortly afterwards a prospectus was issued, with a view to the formation of the company; and in the prospectus it was stated that a contract had been entered into for the purchase by the company of the entire property for 125,000*l.*, including all preliminary expenses, and a premium to the parties who had incurred the risk and the responsibility of the original purchase. The company was formed. The agreement between Kantorowicz and the owners was afterwards discovered, and a bill was filed by three of the committee of management of the company, on behalf of themselves and other shareholders, for the purpose of compelling Kantorowicz

*cett v. Whitehouse*, ib. 132, a somewhat similar case.

(*f*) 3 K. & J. 230. See, too, *Ex parte Perrier*, 7 Ir. Ch. Rep. 256.

wicz to account to the company for the 20,000*l.* premium which he had received in shares from the venders of the mine. On the part of Kantorowicz it was insisted, first, that he had an interest in the mine, and was a selling party, and that, therefore he practiced no fraud on the four original adventurers; and secondly, that even if the transaction could not be upheld as between him and them, the company could not complain, as he and the other promoters avowedly sold the property to the company for 125,000*l.*, and the company had got all they ever expected or had contracted to have. But it was held upon the evidence that Kantorowicz had no interest in the mine, and that, as between him and the other promoters, the transaction could not for one moment stand. With respect to the more difficult question which arose between Kantorowicz on the one side, and the company on the other, it appeared in the first place, that two of the original promoters were members of the committee of management. In this latter capacity they became, as it were, agents for the company, and were, as such, bound to buy for the company at as reasonable a price as possible, although in their character of grantees they were entitled to sell at any price they liked. \*It also appeared that \*583 the 125,000*l.*, at which the company was to buy was fixed by the committee of management, upon the assumption that 85,000*l.* was, in fact, to be paid to the vendors of the mine and that the difference between 85,000*l.* and 125,000*l.* would cover the preliminary expenses, and what was considered to be a fair premium to the promoters. This premium was alluded to in the prospectus, and was a premium of 30,000*l.*, to be paid out of the difference between the 85,000*l.* and the 125,000*l.* Another premium, payable out of the 85,000*l.* to one of the promoters alone, was never contemplated in drawing up the prospectus. Upon these grounds it was held not to be competent to Kantorowicz to get a bonus of 20,000*l.*, in addition to his share of the 30,000*l.*, and that having kept back the transaction as to the 20,000*l.*, he ought to be considered as having joined the other four promoters in stipulating for payment by the company of a premium of 30,000*l.*, and no more. He in fact allowed them in the exercise of their judgment as to what was a right premium to demand of the company, to contract with the company for the 30,000*l.*, and that was the con-

tract which the Court held ought to be performed as between the company and the promoters (*g.*)

Again in *The New Sombrero Phosphate Co. v. Erlanger* (*h.*), a New Sombrero, lease of some property was sold to an agent for a syndi-  
cate, i. e., a group of speculators. One of these specu-  
lators on behalf of himself and the others, got up a company to buy  
the property from them. An agent of theirs entered into a provis-  
ional contract with a nominee of their own for the sale of the prop-  
erty to him, as trustee for the intended company, at the advanced  
price, to be paid for in cash and shares. The company's memoran-  
dum and articles of association were prepared under the direction  
of the chief promoter. There were five directors. Of these two  
were abroad, and the others were all in fact nominees, and more or  
less under the control of the chief promoter ; one of them was  
\*584 the person who originally \*purchased as agent for him  
and the other speculators. The agreement between this  
agent and the trustee for the company was alluded to in the arti-  
cles of association, and also in a prospectus published by the direct-  
ors. This prospectus was in fact prepared under the instructions  
of the chief promoter. The solicitor of the company was the solic-  
itor of the promoters. The prospectus stated that the provisional  
contract with the trustee for the company had been approved by the  
directors, and in fact the directors in this country had adopted it ;  
but they had in truth no discretion in the matter ; they had no in-  
dependent advice, and one of them was the trustee for the promot-  
ers. Their approval was therefore a mere sham. Upon the true  
facts becoming known, the company repudiated the contract, and  
filed a bill to set it aside. The V.-C. Malins dismissed the bill, be-  
ing of opinion that the promoters of the company were not in such  
a fiduciary position towards it as to render it obligatory upon them  
to disclose that they were themselves selling their own property to  
the company. But the Court of Appeal reversed this decision,  
upon the ground that the promoters stood in a fiduciary relation to  
the company, which was their creature; and were bound to disclose  
the fact that they were selling their own property to the company.

(*g.*) The result, it is apprehended, would not have been different if the four promoters had insisted on keeping the company to the bargain for 125,000*l.*, and had claimed to have the 20,000*l.* stipulated for by Kantorowicz divided

between him and themselves. As it was, they abandoned any interest they might have in the 20,000*l.* to the company.

(*h.*) 5 Ch. D. 73. See, also, *Bagnall v. Carlton*, 6 Ch. D. 371. In this case a fiduciary relation was held to

In the *Phosphate Sewage Co. v. Hartmont* (i) the promoters had no title to the property they sold. The trustees of the company to whom they sold it were their own financial agents, and were paid a large commission by them out of the purchase money obtained from the company. The solicitors to the company were the solicitors to the promoters, and neglected their duty. The contract was set aside; the so-called trustees had to repay the commission they received; and all the defendants, including the solicitors, were ordered to pay the costs of the suit.

The general principle illustrated by the foregoing decisions is too well established to be now disputed; but in applying that principle there is often a difficulty in determining when a promoter of a projected company begins to be in such a position as to be unable to make a secret profit by a sale to it, or to persons acting on its behalf. On the one hand it is quite plain that a fiduciary relation between a promoter and a company may exist long before the actual formation of a company by registration or otherwise. (k) On the other hand, it is obvious that something must be done beyond a purchase and resale, to constitute such a relation: something must, it is submitted, be done by the promoter to impose upon him the duty of protecting the interests of those who ultimately form the company. He assumes this duty if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control, and who are practically himself in disguise; he also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty and who are in no way under his influence. A fraud by him on them will of course vitiate any agreement based on the fraud, whether there is any fiduciary relation between him and them or not; but the principles now being investigated presuppose the existence of that relation, and a breach of the obligations incidental to it, and no fraud other than that involved in their breach.

have existed between the promoters of a company and the company before it was formed; the promoters were compelled to account to the company for the profits made by them under a concealed agreement they being allowed to deduct such allowances for expenses incurred in

forming the company. Erlanger's case is under appeal to the House of Lords, (i) *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 395.

(k) See the cases, *ante*, p. 581, and *Bank of London v. Tyrrell*, 10 H. L. C. 26.

The *Albion Steel and Wire Co. v. Martin* (Z) illustrates the above remarks. There two persons carried on a business which was afterward sold to a company formed in order to buy it. The defendant had long supplied the vendors with goods for their business, and at their request he agreed to become a director of the company. After he had so agreed, and before the company was formed, he contracted to supply goods to the vendors, and these contracts were not completed when the company took over the business. The business was taken over with all contracts pending at the time of its transfer, and the defendant completed the contracts into which he had entered, and was paid by the company of which he had become a director. An attempt was made by the company to compel him to account for the profit made by him, at the expense of the company, from these contracts. But it was held that he was not bound to do so. There was no fraud whatever in the transaction; the defendant had dealt with the vendors; \*586 they \*had dealt with the company; the company had trusted them, and he was not concerned directly or indirectly in the purchase by the company of their business, and was not directly or indirectly in the double position of buyer and seller; and in his own contracts with the vendors they were the guardians of the interests of the company. In this same case, however, the defendant had, after he had become a director, entered into similar contracts with the company itself, but he did not attempt to retain the profits on them, and it is plain that he could not have done so.

The principles illustrated by the foregoing decisions apply, if possible, more strongly to the solicitors of projected companies than to other persons. The relation of solicitor and client in cases of this sort is considered as commencing from the time when the solicitor first acts in any matter relating to the company; and if he afterwards acquires property for himself and sells it at a profit to the company, without the fullest disclosure, the company can retain the property and compel him to refund the profit. (m) Moreover, if the solicitor to the company is, as he frequently is, the solicitor to the promoters, and he

(Z) 1 Ch. D. 580.

(m) *Bank of London v. Tyrrell*, 10 H. L. C. 26, affirming mainly, but in some respects varying the decree below, in 27 Beav. 273. The company bought only

part of what its solicitor had purchased, and the House of Lords held that the company had nothing to do with the profit made by re-selling the rest of the property.

neglects his duty to the company when he knows that the promoters are acting improperly towards it, he runs the serious risk of being held liable to the costs of proceedings against them. (*n*)

Such being the principles which the Court enforces, it need hardly be added, that contracts of this class will not be decreed to be performed by the company; even although the company's articles of association provide that they shall. (*o*) Any concealed agreement, moreover, between a vendor to a company and its directors, to the effect that they shall profit by the purchase by the company will entitle the company to repudiate its agreement with the vendor. (*p*)

No specific performance of contracts tainted with want of good faith.

The right of the company in these cases is to rescind the contract, or at its option to hold the property it has purchased, and to pay no more for it than its agent or trustee himself paid. (*q*) This, of course, the company must do; and if it has not done so, and cannot do so, it cannot obtain this relief against him. (*r*) Further, if the agent sells to the company property which is his own, but for which he has paid nothing, the company can only retain the property upon the terms of paying its proper value. (*s*)

Option of company in such cases.

The liability of promoters and others who issue prospectuses and fail to comply with the provisions of § 38 of the Companies Act, 1867, has been already noticed. (*t*)

### (b). *Companies formed.*

#### *Duties of directors and their position as trustees.*

The duties of directors begin from the moment they become directors; but persons who are directors may have come under

(*n*) *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394.

(*o*) *Maxwell v. Port Tennant, &c.*, Co. 24 Beav. 495. See, too, *Ellis v. Colman*, 25 Beav. 662; *Flanagan v. Gt. Western Rail. Co.* 7 Eq. 116, a case of an agreement with a director.

(*p*) *Ex parte Williams*, 2 Eq. 216.

(*q*) See *Bank of London v. Tyrrell*, 10 H. L. C. 26.

(*r*) See *Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586. The observations of the M. R. in this case, to the effect that the company could only adopt

the contract in toto, or rescind it in toto, must be taken with reference to the facts of the case before him. The company there sought to repudiate the whole transaction after it had rendered itself unable to restore what it had got by means thereof. See, as to this, *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; *Phosphate Sewage Co. v. Hartmont*, ib. 394.

(*s*) See *per* Lord Romilly, in 25 Beav. 595, 596.

(*t*) *Ante*, book i. ch. 5, § 1, p. 115.

obligations to the company long before they became directors of it. Whether they have done so or not depends upon the principles investigated in the foregoing pages. (u) In the ensuing pages it is proposed to examine the duties of directors after they have become such.

Directors of a company are, to a certain extent, trustees for the shareholders. The property of the company may not be legally vested in the directors, but it is practically under their control; and they are bound to employ it for the purposes for which it is entrusted to them. So the powers which the directors have, *e. g.*, of calling meetings, electing members of their own board, making calls, forfeiting shares, &c., &c., are reposed in them in order that such powers may be *bonâ fide* exercised for the benefit of the company as a whole; and any exercise of such powers for other purposes is a breach of trust, and will be treated accordingly. (v)

It follows as a necessary consequence that directors of a company are bound to account to the company for all profits made by themselves, by the employment of the assets of the company, and for all profits made by them at the expense of the company, unless they can show that the company, with a full knowledge of all the facts, have agreed to allow them to retain such profits for their own benefit.

All the authorities referred to in the preceding pages, showing the duties of partners and promoters, are relevant to the present inquiry, and may be referred to in support of the foregoing general statement.<sup>1</sup> In addition to them the following may be also usefully alluded to.

In the celebrated case of *The York and North Midland Railway Company v. Hudson* (x), a quantity of shares in a railway company were placed at the disposal of its directors, amongst whom the defendant was the most influen-

(u) They had, for example, in *Hichens v. Congreve*, 1 R. & M. 150; *Fawcett v. Whitehouse*, ib. 132; but not in *Albion Steel Wire Co. v. Martin*, 1 Ch. D. 580.

(v) See generally as to the duties of directors, *York and North Midland Rail. Co. v. Hudson*, 16 Beav. 485. As to the

rule against not interfering in matters of internal management, see *infra*, book iii. c. 10, § 3.

<sup>1</sup> See *ante*, 572, notes; 1 Story's Eq. Jur. § 323.

(x) 16 Beav. 485. The judgment in this case is particularly valuable with reference to the position of directors.

tial. The defendant disposed of these shares by issuing some 5000 of them to nominees of his own, causing them to be sold for his benefit and putting the proceeds of the sale into his own pocket, accounting, however, to the company for the money due on them in respect of deposits and calls. The defendant contended that the shares in question were in fact a present to himself, in consideration of his great services to the company; but the Court thought otherwise, and having come to the conclusion that the shares were to be at the disposal of the \*directors as trustees for the com- \*589 pany, compelled the defendant to account for the moneys derived by him from their sale. The Court also held, that the defendant was not entitled to be allowed any part of such moneys by way of remuneration for his services, or on account of money disbursed by him for the company in a manner which he either could not or would not explain. (y)

Directors selling shares for their own benefit.

York and North Midland Rail. Co. v. Hudson.

In *Parker v. McKenna* (z), a banking company resolved to issue 20,000 new shares, and those not taken up by the old shareholders were to be disposed of by the directors at a certain price. The old shareholders only took up about one-half of the shares; and the directors made an arrangement with one Stock that he should take all the rest at the price fixed, and pay for them as he found purchasers for them. He was unable to pay for them all, and he applied to the directors to take a large part of them off his hands. Some of them agreed to do so; and each of the defendants took a certain number, sold what he took at a price considerably higher than that at which the directors had been authorized to sell them, but only accounted to the company for that price. When, however, the shareholders discovered what had been done, they claimed to be entitled to share all the profits thus made by the defendants, and their claim was upheld by the Court. It was conceded in this case, that if the directors had actually sold the shares to Stock, and he had *bonâ fide* paid for them and completed his title to them, the directors (or any one else) might have bought them from him and resold them at a profit; but the arrangement with him was such that the shares had never

Profits made on issuing shares.

*Parker v. McKenna.*

(y) In *Dunston v. Imperial Gas Co.* 3 B. & Ad. 125, it was held that directors are not impliedly entitled to any pay for their services; and see as to making

presents to directors, *Rosmore v. Mowatt*, 15 Jur. 238, V.-C. K. B.

(z) 10 Ch. 96.

become his ; the duty of the directors to the shareholders with respect to the disposal of the shares had not been performed when they were taken off his hands, and the shares were in effect under the control of the directors as unissued shares when the defendants themselves sold them at a profit.

Again, the directors of a company are not entitled to retain for their own benefit any advantages they may receive by way of bonus, commission, or otherwise on the sale of the company's business, or on the amalgamation of the company with some other (*a*). In *Gaskell v. Chambers* (*b*), the directors of a company, which amalgamated with another company, received from the latter a considerable sum, the particulars of which they kept secret. In a suit instituted on behalf of the shareholders in the first company, this money was held *prima facie* to belong to them, and it was ordered to be paid into Court. (*b*)

So, if on the formation of a company, its directors receive bonuses or other advantages from the promoters on a sale to the company, or on the adoption or ratification of a contract by the company, they can be compelled to account for what they so receive. (*c*)

Another illustration of the same general principle is afforded by those cases in which a director has had shares allotted to him as a qualification, and has had them paid up out of money belonging to the company, and been compelled to refund the money so paid. (*d*)

Indeed, it is not going too far to say that every director of a company is bound, when his personal interest conflicts with his duty to the shareholders, to perform his duty towards them at the sacrifice of his own interest ; and a transaction in which a director, on behalf of the company, has in fact, been dealing with himself as an individual, cannot stand.<sup>1</sup> This was solemnly decided in the House of Lords, where it was unanimously held, that a contract entered into between a firm of ironfounders for the supply of railway chairs to a company, one of the directors of which was a member of the firm, clearly could not be

(a) *General Exchange Bank v. Horner*, 9 Eq. 480.

(b) 26 Beav. 360.

(c) See *Madrid Bank v. Pelly*, 7 Eq. 442, and the last two notes, and the cases *ante*.

(d) *Hay's case*, 10 Ch. 593. See, also, *Carling's case*, 1 Ch. D. 115. These cases will be noticed hereafter under the head *Contributories*.

<sup>1</sup> See, generally, 1 Story's Eq. Jur. § 323, and notes.

enforced against the company. (*e*) This decision did not turn upon any act of Parliament, but was based upon the general principles applied by courts of equity to trustees and agents in their dealings with those whose interests are \*committed to their charge. The same principles unfortunately were not formerly recognized at law to the same extent as in equity; and it was therefore to be regretted that the Companies act, 1862, contained no provisions similar to those in the repealed act 7 & 8 Vict. c. 110, making void contracts between companies and their own directors unless sanctioned by the shareholders. (*f*) But since the Judicature act this has probably ceased to be of any consequence.

Whether, however, this be so or not it is clearly settled that the directors of a company cannot, without its consent, make a profit at its expense in the course of business Profits made by transacting business. transactions with it or for it. This is shown by *Albion Steel and Iron Works Co. v. Martin* (*g*), already alluded to, and by *Imperial Mercantile Credit Association v. Coleman*. (*h*) In that case a director of a financial company was authorized to do some business for it at a certain commission to be paid to the company. He in fact got a larger commission, and it was held the company was entitled to it, although he had told the other directors that he had an interest in the transaction. He never, however, told them what his interest was; and it was held that in order to entitle himself to the commission he was bound to make a full disclosure of his interest. (*i*)

But directors may issue debentures of a company at a discount if they cannot issue them at par; and it has been held Taking debentures at a discount. that if a director takes some of them himself at the same price as they are issued to other people, he cannot be compelled to pay their full value. (*k*)

The principles illustrated and enforced in the preceding pages

(*e*) *Aberdeen Rail. Co. v. Blaikie*. 1 MacQ. 461. See, also, *Flanagan v. Gt. Western Rail. Co.*, 7 Eq. 116; *Murphy v. O'Shea*, 2 Jo. & Lat. 422. See *Foster v. The Oxford Rail. Co.* 13 C. B. 200, *ante*, p. 553.

(*f*) See *ante*, p. 553.

(*g*) 1 Ch. D. 580, *ante*, p. 585.

(*h*) L. R. 6 H. L. 189, reversing S. C. 6 Ch. 558.

(*i*) See, also, *Dunne v. English*, 18 Eq. 524.

(*k*) *Campbell's case*, 4 Ch. D. 470.

are moreover applied where all the persons interested in the company commit that which is a fraud on those only who subsequently join it. Thus, in *The Society of Practical Knowledge v. Abbott* (l), a corporation was created by charter with a capital of 20,000*l.* in four hundred 50*l.*

shares. At the time of the granting of the charter, four persons only held shares, \*and they appropriated the whole of the shares equally amongst themselves, and debited themselves in the books of the company with the 20,000*l.* This sum they did not pay, but after spending, as they alleged, 16,000*l.* in taking and fitting up the Adelaide Gallery, they paid 4000*l.* into a bank to the credit of the company. They then sold shares; each for his own benefit, and for what he could get. It was afterwards alleged that 8000*l.* only, and not 16,000*l.*, had been expended for the purposes mentioned, and that in point of fact, the four original members of the society had benefited themselves at the expense of the society to the extent of 8000*l.* A bill was filed by the company against them for an account, in order to compel them to pay this amount; and a demurer to the bill was overruled, although it was strongly urged on behalf of the defendants, that they were the company at the time when the acts complained of were done, and that they therefore had a right to do as they liked with the shares.

The duties of the directors as trustees are by no means confined to an obligation to account to the company in respect of gains made by themselves at its expense.

Directors are responsible for the loss of the company's assets if that loss is attributable to the employment of the assets in a manner and for purposes not warranted by the constitution of the company. (m) Thus, in *the Land Credit Co. of Ireland v. Lord Fermoy* (n), the directors of a company who had

(l) 2 Beav. 559. See, also, the observations of Jessel, M. R., in 5 Ch. D. 113, as to duties to future shareholders.

(m) But see *Pickering v. Stephenson*, 14 Eq. 342, as to their non-liability

where they act *bona fide* and with the sanction of a majority of shareholders.

(n) 8 Eq. 7, and 5 Ch. 763. See, also, *Joint Stock Discount Co. v. Brown*, 8 Eq. 381. Compare *Turquand v. Marshall*, 4 Ch. 376.

improperly employed its funds in buying up its own shares were held liable to replace the funds so spent. So in *Grimes v. Harrison* (*σ*) the directors of a building society were held liable to make good money of the society improperly expended in the purchase of land. So if directors are parties \*to a fraudulent \*593 transaction by which their company suffers loss, they can be compelled to indemnify it against such loss. (*p*)

The property of a company is so far regarded as in the nature of trust property that it can be recovered by the company from any person who has obtained it from the directors with notice that they are acting beyond their powers (*q*.)

Actions to recover property of a company.

Although, generally speaking, directors have a wide discretion, and in the absence of proof of *mala fides*, it may be difficult to establish a case of culpable negligence or willful default, yet if such a case be proved, and loss by the company attributable thereto be also proved, the directors will be liable to make good such loss (*r*.) Thus in *Evans v. Coventry*, it was sought to make the directors of a company responsible for monies of the company embezzled by its secretary, on the ground that the directors had neglected to obtain security for his good conduct, as they were required to do by the company's deed of settlement. The deed only required the directors to take such security as they thought proper, and no collusion or dishonesty was imputed to them, and under these circumstances the V.-C. Kindersley held that they were not liable to make good the monies in question (*s*.) But on appeal, an inquiry on the subject was direct-

Culpable negligence and willful default.

Negligence in taking security.

(*o*) 26 Beav. 435.

(*p*) See *Parker v. Lewis*, 8 Ch. 1035, where the court held there was no loss caused by the fraudulent transaction.

(*q*) *Bryson v. Warwick and Birmingham Rail. Co.* 4 DeG. M. & G. 711, and *Ernest v. Croysdill*. 2 DeG. F. & J, 175, which require to be studied together. See, also, *Hardy v. Metropolitan Land, &c., Co.*, 7 Ch. 427, reversing 12 Eq. 386. *Gray v. Lewis*, 8 Eq. 526, was decided on this principle, and, although reversed, 8 Ch. 1035, may be usefully referred to as illustrating the principle. The money there sought to be recovered never, in fact, belonged to the compa-

ny. Its title was based on a sham and fraudulent transaction. In *Grimes v. Harrison*, 26 Beav. 435, the purchaser of the company's property was held to have had no notice of the directors' want of authority to sell it. As to ordering defendants in such cases not to part with the property pending litigation, see *Bank of Turkey v. Ottoman Co.* 2 Eq. 366; *Hagell v. Currie*, 2 Ch. 449.

(*r*) See *Charitable Corp. v. Sutton*, 2 Atk. 400, and *Overend, Gurney, & Co. v. Gibb*. L. R. 5 H. L. 480.

(*s*) *Evans v. Coventry*, 2 Jur. N. S. 557.

ed, with a view, it is conceived, to make the directors responsible, if the result of the inquiry should prove adverse to them (*t.*)

\*394 Although the \*directors had a discretion as to what security they should require, they were culpably negligent in taking none at all.

Again, in *Western Bank of Scotland v. Bairds* (*u*), directors were held liable for losses sustained by reason of their neglect, in not causing the business of the company to be stopped pursuant to a provision to that effect in its articles; and although in a subsequent English case of a similar nature the decision was different, that case was decided on the ground that the shareholders had sanctioned the continuance of the business. (*x*)

It is clearly established that directors who keep within the limits of their authority, and act *bonâ fide* to the best of their judgment, are not liable to make good to the company the losses which may result from their acts. Thus it has been held, that directors acting *bonâ fide*, and within their powers, are not liable for a loss arising from a loan to a co-director who had died insolvent (*y*), nor for losses occasioned by purchasing a business which they knew to be insolvent at the time of purchase (*z*); nor for omitting to take mortgage securities to cover the amount of the insolvency. (*a*) Nor are directors acting *bonâ fide* and within their powers liable to refund to the company sums paid by way of commission and promotion money, to persons other than themselves, although such payments may have been made for very inadequate considerations. (*b*)

Moreover, if judgment has been obtained against a company for a large sum of money, and the directors, instead of appealing, *bonâ fide* compromise the matter by paying less than the sum recovered, they cannot be compelled to refund to

(*t*) S. C. 8 DeG. M. & G. 835. See clause 6 of the decree on appeal. Compare *Overend, Gurney & Co. v. Gurney*, 4 Ch. 701, and *Overend, Gurney & Co. v. Gibb*, L. R. 5 H. L. 480, where there was no obligation to take any security.

(*u*) Cited in 4 Ch. 381.

(*x*) *Turquand v. Marshall*, 4 Ch. 376, reversing 6 Eq. 112. See also, *Lethbridge v. Adams*, 13 Eq. 547.

(*y*) *Turquand v. Marshall*, 4 Ch. 376, see p. 386.

(*z*) *Overend, Gurney & Co. v. Gibb*, L. R. 5 H. L. 480, affirming *Overend, Gurney & Co. v. Gurney*, 4 Ch. 701.

(*a*) *Ib.* Compare *Evans v. Coventry*, 8 DeG. M. and G. 835, cl. 6 of the decree on appeal.

(*b*) *General Exchange Bank v. Horner*, 9 Eq. 480.

the company what they so pay, although the judgment against the company may have been erroneous (*c.*)

\*The most difficult question which arises with reference \*595 to the liability of directors is the extent to which each is liable for the acts of the other. The following appear to be the principles applicable to this subject :—

Liability of  
directors for  
acts of each  
other.

1. All those directors who are actually implicated in a breach of trust by misapplying the company's money (even although they only sign cheques prepared by others), are jointly and severally liable for the losses arising therefrom. (*d.*)

2. Directors who know of and sanction such a breach of trust are implicated in it within the meaning of this rule, although they do not actively take part in it. (*e.*)

3. So are directors who know of the breach of trust, but take no steps to prevent it beyond writing a letter of disapproval. (*f.*)

4. Where their liability is to account for profits improperly received by them, they are only severally liable for their own receipts, and are not jointly and severally liable for each other's receipts. (*g.*) But it is submitted that their liability is joint and several if there has been a joint receipt by them all, and then a division amongst themselves of what they have all received; or if they have all been implicated in some joint breach of trust resulting in profit to them all.

5. It has been decided that a director who is not cognizant of a breach of trust committed by his co-directors, and who takes no part in it, is not liable for it. (*h.*) This point, however, involves the question, whether a director is not bound to make himself acquainted with what his co-directors are doing, and to take such steps as may be in his power to prevent them from doing wrong. On this question opinions differ, and it can scarcely be considered as settled. (*i.*) If, \*indeed (as often happens), the \*596

(*c.*) See *Parker v. Lewis* 8 Ch. 1035.

(*d.*) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381; *Land Credit Co. v. Lord Fermoy*, 8 Eq. 7, 5 Ch. 763.

(*e.*) *Land Credit Co. v. Lord Fermoy*, 8 Eq. 7, and 5 Ch. 763, where the sub-committee were the persons more immediately to blame.

(*f.*) *Joint Stock Discount Co. v.*

*Brown*, 8 Eq. 381.

(*g.*) *Parker v. McKenna*, 10 Ch. 96; *General Exchange Bank v. Horner*, 9 Eq. 480.

(*h.*) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381; *Ashurst v. Mason*, 20 Eq. 225.

(*i.*) Compare the judgment of the M. R. in the *Land Credit Co. v. Lord Fer-*

constitution of the company is such as to justify a director in leaving certain matters to his co-directors, or some of them, he is justified in trusting them with such matters, and is not responsible for breaches of trust committed by them and concealed from him. (*k*) But in other cases his irresponsibility is by no mean so clear.

6. Nor, it seems, is a director liable for breaches of trust committed by his co-directors before he became a director but afterwards discovered by him. (*l*) In this case the new director's liability, if any, can only be for the loss sustained by the company by reason of his omission to make known what he has discovered, and to compel the real delinquents to make good their breach of trust; and it is very questionable whether an incoming director is liable in point of law for such omissions.

That powers reposed in directors are regarded as being in the nature of trusts, is clearly shown by Gilbert's case (*m*), in which it was held that a director could not exercise his power of making calls for his own benefit and without regard to the interests of the company: and in that case a call was postponed in order to enable a director to transfer his shares, and a transfer by him in the interval was held invalid. There are other cases which show that directors have no right to favor one set of shareholders more than another (*n*); and that powers of accepting surrenders of shares and of forfeiting them, must be exercised *bonâ fide* for the purposes for which they are conferred. (*o*)

Before leaving the subject of the liability of directors to make good assets of the company improperly lost or parted with, or to account for profits made by them at the expense of the company, it is material to consider whether the shareholders have acquiesced in what has been done or not. Cases indeed may occur where their acquiescence is immaterial, but \*this is only where the company is incorporated and its

moy, 8 Eq. 7, with the last cases, and see *Turquand v. Marshall*, 4 Ch. 385.

(*k*) *Land Credit Co. v. Lord Fermoy*, 5 Ch. 763, reversing on this point, S. C. 8 Eq. 7.

(*l*) See *Ashurst v. Mason*, 20 Eq. 225; *Turquand v. Marshall*, 4 Ch. 385; *Evans v. Coventry*, 8 DeG. M. & G. 835, decree cl. 2; but observe the Scotch cases

*contra* there cited.

(*m*) 5 Ch. 559. See, also, *Sykes' case*, 13 Eq. 255, as to paying calls in advance, and then taking them back for fees.

(*n*) *Richardson v. Larpent*, 2 Y. & C. C. C. 507; *Harris v. The North Devon Rail. Co.* 20 Beav. 384.

(*o*) *Infra*, c. 5, §§ 7 & 8.

funds have been applied in a manner which the shareholders could not in point of law sanction or ratify. (*p*) In other cases the acquiescence of the shareholders affords a complete defense to the directors: *e. g.*, where it is attempted to make them refund dividends improperly paid to the shareholders (*q*); or to make good losses sustained by the company after its business ought by the articles to have been stopped, but which the shareholders, knowing the facts, allowed to be continued. (*r*) Again, where a director has made a profit at the expense of the company, and this circumstance is known to the other directors, and they, <sup>Sanction by other directors.</sup> acting *bond fide*, sanction it, having power so to do, the shareholders and the company will be bound by their sanction. (*s*)

The right of directors as trustees to be indemnified by the company against expenses and liabilities incurred by them <sup>Indemnity.</sup> in the exercise of their powers, will be alluded to hereafter. (*t*) But it may be properly observed here that directors may be entitled to contribution and indemnity amongst themselves in respect of a demand against them on the part of the company. (*u*) Thus, where shares in a company were purchased and transferred into the name of a director as trustee for the company, pursuant to a resolution of the board which was not binding on the company, it was held that he was entitled to be indemnified by the other members of the board who had concurred in the transaction against the claims made on him by the company. (*x*)

\* SECTION III.—OF THE POWERS OF MAJORITIES.<sup>1</sup>

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In the event of a difference arising between partners, it becomes necessary to consider whether there is any method of <sup>Disputes between partners.</sup> determining which of them is to give way to the other. It is not uncommonly supposed by the public, that the minority of

(*p*) As in *Society of Practical Knowledge v. Abbott*, 2 Beav. 559, *ante*, pp. 591, 592; and see p. 258, *et seq.*

(*q*) *Turquand v. Marshall*, 4 Ch. 376.

(*r*) *Ibid.* See, also, *ante*, p. 594.

(*s*) *Imperial Mercantile Credit Assoc. v. Coleman*, 6 Ch. 558, reversed, L. R. 6 H. L. 189, but only on the ground that the other directors were not sufficiently

informed of the facts.

(*t*) *Infra*, book iii. c. 6, § 1.

(*u*) See *Ashurst v. Mason*, 20 Eq. 225, and *Ashurst v. Fowler*, *ib.*

(*x*) See the cases in the last note. A director who was only present when the transfer was formally approved was held not liable.

<sup>1</sup> See *post*, 899, *et seq.*

the partners, if they are unequally divided, must submit to the majority. But this is by no means the case; for, as will be seen presently, the majority cannot oblige the minority except within certain limits.

The first point to determine is, whether the partnership articles, or in the case of a company the act, charter, or deed of settlement, or regulations by which it is governed, do or do not contain any express provision applicable to the matter in question; for if they do, such provision ought to be obeyed. (y)<sup>2</sup> If they do not, then the nature of the question at issue must be examined; for there is an important distinction between differences which relate to matters incidental to carrying on the legitimate business of a partnership or company, and differences which relate to matters with which it was never intended that the partnership or company should concern itself.

With respect to the first class of differences, regard must be had to the state of things actually existing; for, as a rule, if the partners are equally divided, those who forbid a change must have their way: *in re communi potior est conditio prohibentis*. (z) Upon this principle it is that one partner cannot either engage a new or dismiss an old servant against the will of his co-partner. (a) If, however, in a case of this description, unprovided for by previous agreement, the partners are unequally divided, the minority must give way to the majority. (b)<sup>3</sup> This doctrine has been held

How to be settled.  
1. Disputes on matters arising in ordinary course of business.

Power of majority in such cases.

(y) The distinction between clauses that are directory and those that are imperative will be adverted to hereafter. The general obligation to observe the provisions of companies' deeds of settlement will be found well put in Brown's case, 19 Beav. 97, and Lawes' case, 1 DeG. M. & G. 421.

<sup>2</sup>See *Waterbury v. Express Co.* 50 Barb. 157; 3 Abb. Pr. (N. S.) 163.

(z) But see as to the employment of a ship, *Abbott on Shipping*, p. 82, ed. 9; and as to completing contracts already entered into, *Butchart v. Dresser*, 4 DeG. M. & G. 545.

(a) See *Donaldson v. Williamson*, 1 Cr. & M. 345.

(b) See *Gregory v. Patchett*, 33 Beav. 595; *Const v. Harris*, T. & R. 518;

*Robinson v. Thompson*, 1 Vern. 465; as to opening accounts, *Morgan's case*, 1 M. & G. 235.

<sup>3</sup>In directing the business of a partnership, a majority shall govern, notwithstanding the dissent of the minority. *Peacock v. Cummings*, 5 Phila. 253; 46 Pa. St. 434; *Kirk v. Hodgson*, 3 John. Ch. 400; *Waterbury v. Express Co.* 50 Barb. 157; S. C. 3 Abb. Pr. (N. S.) 163; *Peacock v. Cummings*, 46 Penn. St. 434; *Johnston v. Dutton*, 27 Ala. 245; *Campbell v. Bowen*, 49 Ga. 417. See, also, *Livingston v. Lynch*, 4 John. Ch. 573; *Western Stage Co. v. Walker*, 2 Iowa, 504; *Irvine v. Forbes*, 11 Barb. 587. See, however, *Yeager v. Wallace*, 57 Penn. St. 365.

to apply where the \*majority wished to make a division of \*599 profits, without first paying an outstanding debt (*c*); where the majority wished to borrow money (*d*); where the majority resolved to assign all the joint property to trustees, upon trust for sale and distribution amongst the joint creditors (*e*); where the majority resolved on leasing a part of the property of the company for a temporary purpose (*f*); where the majority of the subscribers to an abortive company resolved that the subscriptions should be returned (*g*); and where the majority approved and adopted accounts fairly laid before them. (*h*) But it seems that a majority

The members of a private association, as a telegraph company, are not partners. They are tenants in common of the property and franchise belonging to the company, and the majority cannot bind the minority, unless by special agreement. *Irvine v. Forbes*, 11 Barb. 587.

Three persons, acting together, borrowed a sum of money from a bank, and shipped a lot of cattle to market consigned to another person to sell, who, after making sale and paying expenses and charges and a mortgage on the cattle, held about half of the proceeds in his hands. One of the partners directed him to pay this balance to the bank, and he agreed to hold it subject to the order of the partners, and he paid it to one of the partners by his and the direction of another, they two constituting a majority: *Held*, that the direction of one partner to pay to the bank, and what he said, gave the bank no lien on the fund. The agent was authorized to pay it, as he did, under the direction of the other two partners; and as he paid the money before the bank filed their bill to enforce payment out of the fund, there was nothing upon which an equitable lien could attach. *Steele v. First Nat. Bank*, 60 Ill. 23.

A co-partnership had been established to purchase Cherokee lands, and to work them for mining, etc., as partners. One of the specifications in the agreement of co-partnership was to be that such

disposition was "made of their property as a majority should deem advisable," two of the partners having become insolvent, and a third nearly so, and all having abandoned the work and neglected payment of the installments for the purchase money, leaving the whole burden upon the fourth partner; neither of these three partners has a right to complain in equity that the fourth partner in order to relieve his sureties, has disposed of the land without the concurrence of a majority, especially is this true as to a purchaser *bonâ fide*, and without notice, for value, from such fourth partner, all they can ask is an account from the fourth partner. *Rhea v. Vannoy*, 1 Jones' Eq. 283; *ib.* 290.

(*c*) *Stevens v. The South Devon Rail. Co.*, 9 Ha. 326. and see *Gregory v. Patchett*, 33 Beav. 595.

(*d*) See *Byron v. The Metropolitan Saloon Omnibus Co.* 3 De G. & J. 123, affirming *S. C.* 4 Jur. N. S. 680; *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733.

(*e*) *Lord v. Governor and Co. of Copper Miners*, 2 Ph. 740.

(*f*) *Simpson v. Westminster Palace Hotel Co.* 2 De G. F. & J. 141. See, also, *Forest v. Manchester and Sheffield Rail. Co.* 30 Beav. 40, and on appeal, 4 De G. F. & J. 126.

(*g*) *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49.

(*h*) *Kent v. Jackson*, 2 De G. M. &

cannot against the will of the minority delegate to a manager the right to sign the partnership name. (*i*)

Moreover, the legitimate business of a partnership or company includes whatever may be necessary for carrying on its business in the way in which it is ordinarily carried on by other people. (*k*) Hence, where the directors of a fire insurance company, the policies of which did not cover losses occasioned by explosions of gunpowder, paid claims made in consequence of losses so occasioned, and it was proved that other companies generally did the same thing, although not bound to do so, it was held that such payments could not be restrained. (*l*) So a railway and ferry company may use its ferryboats for excursion trips when not wanted for the ferry. (*m*)

In questions of the class now under consideration, the views of the majority may vary from time to time, and effect must, it is conceived, be given to them as they change. (*n*)

A very important rule respecting the powers and votes of majorities is, that a majority, to have any weight, must act and be constituted with perfect good faith; for every partner has a right to be consulted, to express his own views, and to have those views considered by his co-partners. In the language of Lord Eldon, "that is the act of all which is the act of the majority, provided all are consulted, and the majority are acting *bonâ fide*, meeting not for the purpose of negating what any one may have to offer, but for the purpose of negating what, when they are met together, they may after due consideration think proper to negative. For a majority of partners to say, We do not care what one partner may say; we, being the majority, will do what we please, is, I apprehend, what a court of equity will not allow." (*o*)

G. 49, and 14 Beav. 367; *Stupart v. Arrowsmith*, 3 Sm. & G. 176.

(*i*) See *Beveridge v. Beveridge*, L. R. 2 Sc. App. 183.

(*k*) See *ante*, p. 236, *et seq.*

(*l*) *Taunton v. Royal Insur. Co.* 2 Hem. & M. 135. See on this case, and and those cited in note (*f*), *Joint Stock Discount Company v. Brown*, 3 Eq. 139.

(*m*) *Forrest v. Manchester and Shef-*

*field Rail. Co.* 30 Beav. 40, and 4 De G. F. & J. 126.

(*n*) See *Exeter Rail. Co. v. Buller*, 5 Ra. Ca. 211, and *A.-G. v. Gould*, 28 Beav. 485.

(*o*) *Const v. Harris*, Turn. & R. 525, and see *ib.* 518, and *Blissett v. Daniel*, 10 Ha. 493; *Great Western Rail. Co. v. Rushout*, 5 DeG. & Sm. 310, and further as to agreements precluding impartial voting, *ante*, p. 548.

Moreover, where powers are conferred on a majority present at a meeting of not less than a certain number of persons, unless such meeting be duly convened and the requisite number be present at the meeting the powers in question cannot be exercised; and although it may be true that the required number of persons was summoned, and that the absentees could not have turned the scale, this will not render valid the acts of the majority of those actually present, for that is not such a majority as was originally contemplated. (*p*)

Passing now to a second class of differences, viz., those which relate to matters with which the partnership was never intended to concern itself, it has been over and over again decided that no majority, however large, can lawfully engage the partnership in such matters against the will of even one dissentient partner.<sup>1</sup> Each partner is entitled to say to the others, "I became a partner in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us, \*and you have no right, \*601 without my consent, to engage me in any other concern, or to hold me to any other terms, or to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you." Nor is it at all material that the new business is extremely profitable. (*q*) This principle is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as being just.<sup>1</sup> No cases upon this subject can be referred to with greater advantage than *Natusch v. Irving* and *Const v. Harris*, both of which were decided by Lord Eldon. (*r*)

In *Natusch v. Irving* (*s*), a company was formed in the early part of the year 1824 for granting fire and life assurances. The capital was 5,000,000*l.*, divided into fifty thousand 100*l* shares. The plaintiff was one of the

Majorities at meetings.

2. Disputes on matters involving a change in the nature of the business,

One dissentient can forbid change.

In companies as well as in partnerships.

Fire and Life Insurance Company turning into a Maritime Insurance Company

(*p*) See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Ex parte Morrison*, DeG. 539. See, too, the cases cited *ante*, p. 244, *et seq.*

<sup>1</sup> See *Abbott v. Johnson*, 32 N. H. 9; *Livingston v. Lych*, 4 John. ch. 573.

(*q*) *A.-G. v. Great Northern Rail. Co.* 1 Dr. & Sm. 154.

<sup>1</sup> See *Ang. & Ames on Corp.* §§ 391,

536 *et seq.*

(*r*) See, too, *Davies v. Hawkins*, 3 M. & S. 488; *Fennings v. Grenville*, 1 Taunt. 241; *Glassington v. Thwaites*, 1 Sim. & Stu. 131.

(*s*) *Gow on Partnership*, App. 398, ed. 3. See, also, *The Phoenix Life Insur. Co.* 2 J. & H. 441.

original subscribers, and held fifteen shares, in respect of which he had paid the required deposit, but he had not executed the company's deed of settlement. In conformity with the rules of the company he had effected a policy with it on his life for 1,500*l*. In the summer of 1824, the act of 6 Geo. 1, prohibiting companies from carrying on the business of marine insurance, was repealed, and shortly afterwards advertisements appeared in the newspapers, stating that the company would commence the business of marine insurance. The plaintiff, in answer to an inquiry whether this announcement was authorized by the directors, was informed that it was, and that if he objected to the course about to be pursued he might receive back his deposit with interest, and have his policy cancelled and the premium returned. In reply to this, the plaintiff stated that he was ready to execute any deed which was in conformity with the prospectus; that he conceived it competent for him to insist that the business in which he was a partner should be carried on according to the agreement which united the partners together; that he could

\*602 not think his doing so would entitle the managers of that partnership to pay him out his capital, and deprive him of a share in a concern of which he had the highest opinion; that he therefore required the directors to abstain from any contracts or engagements relating to marine insurance, as not being contemplated by himself and those who joined the company upon the terms of the prospectus, and that he required an undivided attention on the part of the directors to the objects defined therein. The plaintiff afterwards attended at the office of the company, to execute its deed of settlement, but finding that it contained provisions enabling the company to carry on the business of marine insurance, he refused to execute it, as not being conformable to the terms on which the company was formed. In pursuance of the advertisements, the company had commenced, and it was carrying on, the business of marine insurance; but there was no evidence to show acquiescence on the part of the plaintiff, and there was evidence to show continued opposition by him to the carrying on of such business. The plaintiff applied for an injunction to restrain the directors from effecting marine insurances, and an injunction was granted. (*t*) The judgment of Lord Eldon, as far as

(*t*) The bill was filed by the plaintiff shareholders of the company, against on behalf of himself and all others the directors, and prayed a dissolution,

it relates to the power of a majority, is particularly valuable, and the following extracts from it are constantly referred to:

With respect to the liberty given to the plaintiff to retire, his lordship said: "An offer is made to the plaintiff that he may receive back his deposit, with interest from the date of the payment, and he is desired to consider himself as having received notice thereof.

Answer to objection that dissentient can retire.

But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and in effect, merely by compelling them to retire upon such terms, so as to form a new company. This would, as to partnerships, be a most dangerous doctrine.

\*Where a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means, and assets of the partnership, existing at the time of the dissolution, as beneficially as may be, for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him to whom they have given an offer of his deposit and interest, Take that, and we are a new company, keeping the effects, means, assets, and property of the old, as the property of the new partnership. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares."

\*603

Dissentient need not accept an offer of indemnity.

With respect to the alteration of the law enabling companies to carry on the business proposed, his lordship observed: "The repeal of the act, 6 Geo. 1, which merely made it lawful for societies or partnerships, however numerous their members might be, to insure against marine risks could not make it lawful for companies or societies which were formed for specified purposes of insurances upon lives and against fire, to insure against marine risks, unless the contracts by which such companies were formed, either expressly or impliedly (where individual partners did not consent to embarking in new projects, either originally, or subsequently to the formation of

Answer to argument that the change was warranted by statute.

and, if necessary, a receiver, and an injunction to restrain the defendants from effecting marine insurances in the name and on account of the company, and

from using the name, and from applying the capital of the company for such purposes.

the companies), created an authority in some part of the body to bind all the body to the adoption of such new undertakings."

With respect to the power of a majority, his lordship laid it down that, "If six persons joined in a partnership of life assurance, it seems clear that neither the majority nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly, or impliedly gave that power: because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have acquiesced in such intention, and to have permitted the other partners to have entered upon, and to have engaged themselves and the body in such new projects, and thereby to have placed their partners so engaged in difficulties and embarrassments unless they were permitted to proceed in the farther execution of such projects, if a court of

\*604 equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction." \* \* \* \* "Courts must struggle to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, or empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a Court would act upon in case of a partnership of six, must, as far as the nature of things will admit, be applied to a partnership of 600." \* \* "They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce."

In *Const v. Harris (u)*, the proprietors of Covent Garden Theatre agreed that the profits should be exclusively appropriated to certain definite purposes. Afterwards, the proprietors of seven out of eight shares, entered into an agreement to apply the profits in a different manner, but they had not consulted the owner of the other eighth share, and he disapproved of the alteration. It was held by Lord Eldon, that the majority had no power to depart from the terms of the original agreement; and upon a bill filed by the one dissentient partner for a specific performance of that agreement, a receiver of the profits was appointed. In a long and elaborate judgment, Lord Eldon distinctly recognized the principle, that articles which had been agreed on to regulate a partnership, cannot be altered without the consent of *all* the partners. (x)

(u) Turn. & R. 496.

(x) See Turn. & R. 517, 523. The

whole judgment is well worthy of attentive perusal; but being much to the

In modern cases the same principle has been constantly recognized and followed. (*y*) Indeed it may be said never now to be disputed; the contest always turning on the question, whether the acts of the majority do or do not belong to the class under consideration, rather than to the question whether, if they do, the minority is or is not bound by them. With reference to the former question, it has been held not competent for a majority of shareholders in a company formed for the purpose of making a railway between two places, to make \*a railway between two other places (*z*); nor for the \*605 majority of the members of a fire and life insurance company to convert the company into a marine insurance company (*a*); nor for a majority of the members of a railway company to engage it in the business of coal sellers (*b*); nor for a majority of the members of any company to employ the property or funds of the company otherwise than as contemplated by themselves and the other members; *e.g.*, by dividing the capital amongst themselves (*c*), or even amongst all the shareholders whether they approve or not (*d*); by making presents to the directors (*e*); by paying the costs of actions, &c., instituted by or against the directors as individuals, and not as trustees or agents of the company (*f*); by paying dividends out of capital (*g*); by applying the funds of the company in defraying the expenses of an application to Parliament to alter the constitution or objects of the company (*h*); or in the purchase of shares

Modern cases illustrative of these principles.

same effect as that in *Natusch v. Irving*, the writer has not felt it necessary to make extracts from it.

(*y*) See *Morgan's case*, 1 Mac. & G. 225; *Davidson's case*, 4 K. & J. 688; *Smith v. Goldsworthy*, 4 Q. B. 430; *Davies v. Hawkins*, 3 M. & S. 488.

(*z*) *Bagshaw v. The Eastern Union Rail. Co.* 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51.

(*a*) *Natusch v. Irving*, *ante*, p. 601; *Phoenix Life Insur. Co.* 2 J. & H. 441. In *Rogers v. Oxford, &c., Rail. Co.* 2 DeG. & J. 662, the railway company had express power to become a canal company also.

(*b*) *A.-G. v. Great Northern Rail. Co.* 1 Dr. & Sm. 154.

(*c*) *Menier v. Hooper's Telegraph Co.*

9 Ch. 350; *Griffith v. Paget*, 5 Ch. D. 894.

(*d*) *Holmes v. Newcastle, &c., Abattoir Co.* 1 Ch. D. 682.

(*e*) *York and North Mid. Rail. v. Hudson*, 16 Beav. 485. See, too, *Rossmore v. Mowatt*, 15 Jur. 233, V.-C. K. B.

(*f*) See *Pickering v. Stephenson*, 14 Eq. 322; *Kernaghan v. Williams*, 6 Eq. 228.

(*g*) *McDoughall v. Jersey Hotel Co.* 2 Hem. & M. 528.

(*h*) *Lyde v. Eastern Bengal Rail. Co.* 36 Beav. 10; *Munt v. The Shrewsbury and Chester Rail. Co.* 13 Beav. 1; *Simpson v. Denison*, 10 Ha. 51; *Vance v. The East Lancas. Rail. Co.* 3 K. & J. 50, and the cases there cited.

of retiring shareholders. (*i*) Upon the same principle by-laws which are not warranted by the terms of the instrument which confers the power of making them, are altogether invalid (*k*); and a majority cannot, unless empowered so to do by the company's \*606 act, charter, deed of settlement, or \*regulations, or by some statute, forfeit shares (*l*) or reduce the capital of the company (*m*), or issue preference shares. (*n*)

A company incorporated by charter or special act of Parliament cannot delegate its powers, and cannot therefore transfer its business even for a time to another company (*o*); nor can the majority of the shareholders of any company bind the minority by an agreement to transfer its property and business, unless such power is conferred by the original constitution of the company. (*p*) Nor is it competent for the majority of one company to purchase the assets and liabilities of another without similar powers. (*q*) Whence it follows that two companies cannot amalgamate with each other, unless such a transaction is authorized by the constitutions of both companies, or unless all the shareholders in both consent to the amalgamation. (*r*) And where there is power to amalgamate, that power must be strictly pursued, or at least there must be no substantial departure from it. (*s*)

(*i*) *Hope v. International Financial Soc.* 4 Ch. D. 327; *Hodgkinson v. National Live Stock Insur. Co.* 26 Beav. 473, and 4 DeG. & J. 422; *Gregory v. Patchett*, 33 Beav. 595.

(*k*) *Calder, &c., Nav. Co. v. Pilling*, 14 M. & W. 76; *Adley v. Whitstaple Co.* 17 Ves. 315; 19 ib. 304; 1 Mer. 107.

(*l*) *Barton's case*, 4 Drew. 535, and 4 DeG. & J. 46.

(*m*) *Smith v. Goldsworthy*, 4 Q. B. 430; *Hope v. International Financial Soc.* 4 Ch. D. 327.

(*n*) *Hutton v. Scarborough Cliff Co.* 2 Dr. & Sm. 514 and 521; and on appeal, 6 N. R. 10. Although this was a limited company, the principles on which it was decided appear to apply to all companies.

(*o*) *Hattersley v. Shelburne*, 10 W. R.

881; *Charlton v. Newcastle and Carlisle Rail. Co.* 5 Jur. N. S. 1096; *Winch v. Birkenhead, &c., Rail. Co.* 5 DeG. & S. 562; *Beman v. Rufford*, 1 Sim. N. S. 550; *Salomons v. Laing*, 12 Beav. 377. Compare *Clay v. Rufford*, 5 DeG. & S. 768.

(*p*) See *Ernest v. Nicholls*, 6 H. L. C. 401; *Era Assur. Co.'s case*, 2 J. & H. 400, and 1 H. & M. 672; and, further, as to amalgamating, *Ex parte Bagshaw*, 4 Eq. 341; *Stace and Worth's case*, 4 Ch. 682; *Gilbert v. Cooper*, 10 Jur. 580, V.-C. E., and *Shrewsbury and Birm. Canal Co. v. Stour Valley Rail. Co.* 2 DeG. M. & G. 866.

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) *Clay v. Rufford*, 5 DeG. & Sm. 768

The right of a majority of partners or shareholders to apply to the Legislature or the Crown for an act of Parliament or charter for the purpose of changing the constitution of the partnership or company, has occasioned much discussion and no little difference of opinion. The right of every person to apply to Parliament or the Crown on any subject he pleases is founded upon principles of constitutional law, which are paramount to all others; and although there is an instance in which \*a minority of a chartered society obtained an injunction, restraining the majority from surrendering the existing charter with a view to procure a new one materially differing from it (*t*), the authority of this case is questionable. The Court will, even at the instance of one dissentient shareholder, grant an injunction restraining the application of the funds of an incorporated company in defraying the expenses of obtaining an act of Parliament altering the constitution of that company (*u*); but upon constitutional principles the Court declines to go further, and will not restrain shareholders in a company from applying at their own expense for an act which, if passed, will affect the whole company and change its constitution: those shareholders who object to the application must oppose it in Parliament. (*x*)

Right of majority to apply for power to alter nature of company.

\*607 Ward v. Society of Attorneys.

Such applications may be made, but not at the expense of the company.

With respect to the effect of an unanimous agreement to depart from the original basis of the partnership or company, there is a material difference between partnerships and companies incorporated by charter, or act of Parliament. A partnership, whether large or small, is an association based and depending entirely upon the agreement of its members,

Effect of unanimous resolve to change the nature of the company.

(*t*) Ward v. Society of Attorneys, 1 Coll. 370.

(*u*) Munt v. The Shrewsbury and Chester Rail. Co. 13 Beav. 1; Simpson v. Denison, 10 Ha. 51; Vance v. East Lanc. Rail. Co. 3 K. & J. 50; and the case there cited. As to the costs of such actions, where individual members are made defendants, see Solicitor-General v. Lord Mayor of Dublin, L. R. Ir. 1 C. D. 166.

(*x*) See the last cited cases, and Ware v. The Grand Junction Waterworks Co.

2 R. & M. 470; and as to injunctions restraining applications to Parliament, Steele v. The Metropolitan Rail. Co. 2 Ch. 237; Telford v. Metropolitan Board of Works, 13 Eq. 574; The Lancashire and Carlisle Railway Co. v. The North-Western Rail. Co. 2 K. & J. 293; Heathcote v. The North Staffordshire Rail. Co. 2 Mac. & G. 100. See, also, Bill v. Sierra Nevada, &c., Co. 1 D. G. F. & J. 177, in which an injunction to restrain an application to a foreign government was also refused.

and consequently it is perfectly competent for *all* those members at any time to annul or vary the agreement into which they have entered, and, by making a new agreement, entirely to change the objects of the partnership, and to embark in any speculations of which they all approve. The same observation applies to those companies which resemble partnerships by being based upon a mere agreement. (*y*) But with respect to companies which \*608 are created by a special act of Parliament, or \*by charter, or by letters patent, or by registration, the case is very different; for every company so established is governed by a law defining its objects and limiting its powers, and such law cannot be abrogated by any agreement between the members of the company however unanimous they may be. A registered company cannot alter the nature of its business as defined in its memorandum of association (*z*); nor can even all the members of a chartered company do what they like with its property, *e. g.*, divide it amongst themselves without accounting for its value to the company (*a*); nor can even all the members of a railway company apply the funds of a company to a purpose which is not authorized by the act of Parliament by which the company is governed. (*b*)

On the other hand, it is to be observed, that a corporation acts by a majority; the will of the majority is the will of the corporation; and whatever it is competent for the corporation to do can be done by a majority of its members against the will of the minority. (*c*)<sup>1</sup> It follows from this, that the power of a majority of the shareholders of a company incorporated by charter or act of Parliament, is limited only by that charter or act, unless those who compose the majority have restricted their powers by some special agreement.

Powers of  
majorities in  
the cases of  
corporations.

(*y*) Keene's Executors' case, 3 DeG. M. & G. 272.

(*z*) See *ante*, pp. 558, 559.

(*a*) Society of Practical Knowledge *v.* Abbott, 2 Beav. 559; *ante*, p. 591.

(*b*) Bagshaw *v.* The Eastern Union Rail. Co. 7 Ha. 114, and 2 Mac. & G. 389; Winch *v.* The Birkenhead, Lancashire, and Cheshire Rail. Co. 5 DeG. & S. 562; Beman *v.* Rufford, 1 Sim. N. S. 550; A.-G. *v.* Great Northern Rail

Co. 1 Dr. & Sm. 154; East Anglian Rail Co. *v.* Eastern Counties Rail. Co. 11 C. B. 775.

(*c*) See Grant on Corporations, p. 63, *et seq.*; Australian Aux. St. Clipper Co. *v.* Mounsey, 4 K. & J. 733; Exeter Rail. Co. *v.* Buller, 5 Ra. Ca. 211. See also the statute 33 Hen. 8, c. 27.

<sup>1</sup> See Ang. & Ames on Corp. §§ 221, 499.

Recapitulating the results now arrived at, it appears—

1. That within the limits set by the original constitution of a partnership or company, the voice of a majority must prevail. Recapitulation.

2. That it is not competent for any number of partners or shareholders, less than all, to pass beyond those limits.

3. That it is competent for all to do so, unless they are bound together not only by agreement amongst themselves, but by some charter, letters patent, or act of Parliament.

\*Before quitting the subject which has been \*609 discussed in the foregoing pages, it may be observed, that the various provisions found in partnership articles and companies' deeds of settlement are not all of equal importance, and, that whilst it is not competent for any number of partners, less than all, to disregard those provisions which form essential parts of the partnership contract, the non-observance of others is comparatively of little consequence. This matter will be adverted to hereafter in the chapter on partnership articles, and on companies' deeds of settlement (*d*); and in applying the principle to registered companies, the express power given by statute to alter the articles of association as distinguished from the memorandum of association must be kept in mind. (*e*) Distinction between imperative and directory regulations.

(*d*) See *Re The Norwich Yarn Co.* Bough, 3 Q. B. 845.  
22 Beav. 143; *Thames Haven Dock Co.*

(*e*) See *Sheffield Nickel Co. v. Unwin*,  
*v. Rose*, 4 Man. & Gr. 552; *Miles v.* 2 Q. B. D. 214.

## \*610

## \*CHAPTER III.

OF THE CAPITAL OF PARTNERSHIPS AND COMPANIES, AND OF ITS  
PAYMENT BY CALLS.SECTION I.—GENERAL OBSERVATIONS ON THE CAPITAL OF PART-  
NERSHIPS AND COMPANIES.1. *Capital of partnerships.*

By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business, and intended to be risked by them in that business. The capital of a partnership is not therefore the same as its property; the capital is a sum fixed by the agreement of the partners; whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for not only may he owe the firm money, so that less than his capital is due to him; but the firm may owe him money in addition to his capital, *e. g.*, for money advanced by him to the firm by way of loan, and not intended to be wholly risked in the business. The distinction between a partner's capital and what is due to him for advances by way of loan to the firm, is frequently very material; *e. g.*, with reference to interest; with reference to clauses in partnership articles fixing the amount of capital to be advanced and risked, and prohibiting the withdrawal of capital; and above all with reference to priority of payment in the event of dissolution and a deficiency of assets. (a) The amount of each

(a) See on this subject, *infra*, book, iii. ch. 8, § 1, on partnership accounts.

partner's capital ought, therefore, always to be accurately \*stated, in order to avoid disputes on a final adjustment of \*611 account;<sup>1</sup> and this is more important where the capitals of

<sup>1</sup> The amount of capital furnished by each partner in a firm, and the manner of paying it in, may be proved by other evidence than the articles of co-partnership. *Boyers v. Elliott*, 7 Humph. 204.

Where, in a suit for a dissolution of a partnership, it appeared that there was a mistake as to the amount of capital put in by the complainants, and it appeared that more was put in than was originally stated, but how much more was uncertain: *Held*, that the burden of proof was upon them, and that they should be restricted to the smallest amount proved, especially as one of the complainants was the book-keeper, and should have kept the books so as to show the true state of the affairs. *Moon v. Story*, 8 Dana, 226.

A partnership consisting of four partners was dissolved, two assigning their shares to one of the others, and the remaining two formed a new partnership. In their articles they agreed that, of the property on hand, a sufficient amount should be set apart and appropriated to paying the debts of the old firm; and another amount for improvements made on real estate, and that the remainder should be deemed the capital stock of the firm: *Held*, that the amount set apart for improvements made on real estate did not make a part of the capital stock. *Mathers v. Patterson*, 33 Pa. St. 485.

Where a former clerk is taken into co-partnership by a firm which was indebted to him, and the amount of such indebtedness is placed to his credit upon the new books, to which, on dissolution of the firm, is added his share of the net profits, such indebtedness will not be regarded as capital put in by the new member, but rather as a loan to

the firm to be repaid him, with his share of the profits. *Topping v. Paddock*, 92 Ill. 92.

An incoming partner paid the two original members of the firm money as indicated in the receipt: "Received of E. \$2,000 for and in consideration of one-half interest in one safe, two desks, two pair of scales, one stove and pipe; also the undivided half of our trade and good will, and the benefit accruing therefrom; also one-half of the contract of potatoes for future delivery, and the benefits of the same as per contract of co-partnership made this date between H. E. and M.:" *Held*, that the money so paid belonged to the two original partners, especially if it was credited on the books, in equal amounts to their stock account. *Evans v. Hanson*, 42 Ill. 234.

Two persons agreed to form a planting partnership with a third, and, for that purpose, to sell him for his portion of the capital one-third of a plantation, the price to be paid out of his share of the profits: *Held*, that the joint ownership was not to be treated as if acquired from different vendors, but as a subsidiary to a partnership to whose terms it was subject; and that as by those terms the vendee could not take his capital out of the partnership until payment of the price, neither he, his creditors, nor his representatives, could take his third interest, until the other partners were fully reimbursed. *Thompson v. Mylne*, 6 La. Ann. 80.

Where, by the terms of the agreement, the defendant furnished the capital stock, and the plaintiff contributed his skill and service, and the profits of the co-partnership were to be equally divided, the plaintiff is not to be entitled to any part of the capital stock, on a

the partners are unequal, for if there is no evidence as to the amounts contributed by them, the share of the whole assets will be treated as equal. (*b*).

When the agreed amount of capital of a partnership has been exhausted, and the business cannot be carried on to a profit, the partnership may be dissolved, as has been already pointed out. (*c*) A partner cannot be compelled to furnish more capital than he has agreed to bring in and risk; although he cannot, by limiting the amount of his capital, limit his liability for debts incurred by the firm. (*d*) On the other hand, a partner who has agreed to furnish a certain amount of capital, is bound not only to bring it into the firm, but also to leave it in the business until the firm is dissolved.

It follows from these considerations that the capital of a partnership cannot be either increased or diminished except with the consent of all the members of the partnership; and this rule is perfectly consistent with the obvious fact, that the assets and liabilities of a partnership are necessarily liable to fluctuation, and that the value of each partner's share of such assets constantly fluctuates also.

The difference between borrowing money on the credit of a firm and increasing its capital, has been already adverted to (*e*); and it has been seen, that although each member of an ordinary trading partnership can pledge its credit for money borrowed in order to carry on its business, he cannot render it liable to repay money borrowed by him to enable him to furnish the amount of capital which he has agreed to bring in. (*f*)

settlement of the affairs of the partnership. He has no interest in any part of the capital, excepting so far as in the progress of the business the same may have been converted into profits. *Conroy v. Campbell*, 13 Jones & Sp. 326.

A note given by a partner to his co-partner, as collateral security for the capital advanced by the latter, being intended simply as a receipt for the money, and to secure the return of the capital in the event that no loss occurred, is without consideration to sup-

port it. The rights and benefits resulting to partners constitute the consideration he receives for the capital he may advance; he receives the consideration for his capital by being admitted a partner. *Stafford v. Fargo*, 35 Ill. 481.

(*b*) See, as to the equality of shares, *infra*, book iii. ch. 5, § 2.

(*c*) *Ante*, p. 222.

(*d*) *Ante*, p. 376.

(*e*) *Ante*. pp. 273, 274.

(*f*) *Ib*.

## 2. *Capital of Companies.*

The foregoing observations apply as much to companies as to partnerships; but owing to the division of the capitals of companies into transferable shares, and to the circumstance \*that \*612 the capitals of companies are seldom raised all at once, some further observations respecting them are necessary.

The capital of a company is one of the matters determined upon as soon as its formation is seriously undertaken. The sum fixed upon ought to be so large as to be suffi- Capital of companies. cient to enable the company to carry on its business with success; but it ought not to be larger than is necessary for this purpose; for the greater the capital sunk in any undertaking, the less will be each subscriber's share of profit, unless, indeed, the profits increase with the capital sunk, a result not so often obtained as anticipated. The probable success of any company depends very much upon the capital intended to be embarked in its projected business; if that capital is inadequate, it will probably be wholly lost; whilst if it is more than is required, the interest upon it may eat up all the profits. Hence the amount of a company's capital is Varying the amount of capital. one of those things which, when fixed, cannot be varied without the consent of *all* who join the company, unless there is some special provision to the contrary in the statute by which a company is governed, or in its charter or deed of settlement. This is well illustrated by *Smith v. Goldsworthy (g)*, where Smith v. Goldsworthy. it was held that notwithstanding the very large powers which by a company's deed were conferred upon a general meeting of shareholders, such a meeting was not authorized in so far altering the constitution of the company as to convert its capital from 2,000,000*l.* divided into 20,000 shares of 100*l.* each, into a capital of 1,000,000*l.* divided into 20,000 shares of 50*l.* each. Upon the same principle, a person who agrees to take shares in a company with a given capital, is *primâ facie* not bound to take shares in a company with a different capital (*h*); but persons not unfrequently agree to take shares in companies the capital of which is not defined; and

(g) 4 Q. B. 430. Compare *Ambergate, &c., Rail. Co. v. Mitchell*, 4 Ex. 540, noticed *infra*, p. 613.

(h) See *Bourne v. Freeth*, 9 B. & C.

632; *Fox v. Clifton*, 6 Bing. 776; *Pitchford v. Davies*, 5 M. & W. 2, noticed *ante*, pp. 108, 109.

in such cases they are bound by their agreement, although the capital ultimately fixed upon may differ materially from that originally proposed. (i)

\*613 \*The capital of a company is usually divided into a definite number of equal parts or shares ; and the value and amount of such parts are by no means matters of small importance to the subscribers or shareholders ; for not only is a small share more marketable than a large one, but the extent to which a subscriber or shareholder is liable to contribute to the capital or debts of a company depends on the number and amount of his shares. When, therefore, the number and amount of the shares into which the capital of a company is to be considered as divided are once fixed, no change in these respects ought to be valid unless made under some statutory or other special power, or unless assented to by all the shareholders ; and there are cases to this effect. (k)

However, in the *Ambergate, etc., Railway Company v. Mitchell* (l), a company was incorporated by a special act, which enacted that the capital was to be divided into shares, and that for the purpose of voting, each sum of 25*l.* of the capital should be considered as representing one share. The shares were at first 25*l.* shares, but the company (i. e., apparently the directors) afterwards reduced them to 20*l.* shares, and it was contended in an action for calls on a 20*l.* share, that the alteration in the number and value of the shares was invalid, and that the call was not recoverable. But it was held that there was nothing in the company's special act which prevented the directors from making shares of less than 25*l.* each ; that they were not bound to fix the amount of the shares once for all ; and that, as to the voting, the alteration could not deprive any one of his rights, inasmuch as the only effect of it was, to give every holder of a 25*l.* share, one share and a quarter, instead of one share as before.

Persons who conspire to issue as good, more shares than the authorized number, may be criminally prosecuted. (m)

It is not usual for the whole of the sum fixed upon as the capital

(i) See, for example, *Norman v. Mitchell*, 5 DeG. M. & G. 648; *Nixon v. Brownlow*, 2 H. & N. 455 and 3 ib. 686.

(k) See acc. *Feiling's case* and others; *In re the Financial Corporation*, 2 Ch.

714; *Sewell's case*, 3 ib. 131; *Smith v. Goldsworthy*, 4 Q. B. 430.

(l) 4 Ex. 540.

(m) See *R. v. Mott*, 2 Car. & P.

of a company, to be paid up at once by the subscribers or shareholders. The capital, and the number and amount of \*the shares into which it is to be \*614 Nominal and paid-up capital. divided, having been determined upon, and such shares having been subscribed for, an installment only of the money they represent is paid, and the rest of that money is left to be paid as occasion may require. Hence the distinction between *paid-up* and *nominal* capital. The former is the money which the company actually has or has had ; the latter is the sum to which it is entitled by virtue of the contract entered into by its subscribers and shareholders.

A share, the whole nominal amount of which has been paid to the company is called a *paid-up* share ; whether a Paid-up shares. share can be effectually paid up otherwise than in money has been much discussed. The result of the decisions seems to be that unless the contrary can be shown by reference to some statutory enactment, payment in money's worth *e. g.*, in services rendered or goods supplied to the company, is equivalent to payment in money (*n*) : whence it follows that paid-up shares can be issued in consideration of such services, etc. The abuse, however, of this rule led to the insertion in the Companies act, 1867, of a provision to the effect that shares in companies registered under the Companies act, 1862, must be paid up in cash unless some agreement in writing for payment otherwise is entered into and registered before the issue of the shares. (*o*)

The issue of paid-up shares otherwise than for value (*p*) is a breach of trust on the part of the directors ; and the company and its creditors are entitled to have such shares treated as not paid up (*q*) ; unless they are in the hands of *bonâ fide* holders for value without notice of the facts. (*r*)

(*n*) See Currie's case, 3 DeG. J. & Sm. 367; Pell's case, 5 Ch. 11; Schroder's case, 11 Eq. 131. But see the observations of V.-C. Stuart in Leeke's case, 11 Eq. 100.

(*o*) See 30 & 31 Vict. c. 31, § 25. Spargo's case, 8 Ch. 407, as to what is equivalent to cash. The articles of association are not a sufficient agreement in writing, Pritchard's case, 8 Ch. 956. See, further, in book iv. § 10, Contribu-

tories.

(*p*) As to inquiring into the value, see Pell's case, 5 Ch. 11, and the others cited above.

(*q*) See Bunn's case, 2 DeG. F. & J. 295, Wood's claim and Brown's claim, 9 W. R. 366; V.-C. K.; and the cases in the next note.

(*r*) See Guest *v.* Worcester Rail. Co. L. R. 4 C. P. 9; Waterhouse *v.* Jamieson, L. R. 2 Sc. App. 29. British

Where the liability of the members of a company is limited by charter, statute, or registration, it is, to say the least, questionable whether it can lawfully issue paid-up shares at a discount, and exonerate the taker from liability to pay the difference between the price at which he takes them and their nominal value. (s)

In the absence of any special provision to the contrary, after the capital originally agreed upon has been raised and expended, any shareholder in an unlimited company has a right to say, I will subscribe no more, and if the company cannot now be carried on to a profit, I insist upon its being dissolved. (t) This right is the only security which a shareholder, whose liability is not limited, has against being made responsible for an unlimited amount of debts. It certainly sometimes happens that call after call is made long after the original capital has been paid up and expended, but in order that the shareholders may be liable to pay such calls, they must either have agreed to submit to them, or must have allowed their directors to go on and contract debts which at last have to be met by a general contribution.

A company has no power to increase its capital, unless such power is expressly conferred upon it, or unless all the shareholders agree to subscribe or raise more than the sum originally determined upon (u); and if the capital of a company is fixed by its charter, letters patent, or special act, such capital cannot be increased, even by the consent of all the members of the company. The distinction, however, between borrowing money and increasing capital, which was adverted to on a former occasion must not be overlooked; for it does not follow that because a majority of the shareholders of a company cannot increase the capital of the company, they cannot lawfully, and against the will of the minority, borrow money on the credit of the company. (v)

To the rule that, in the absence of special powers, the capital

Farmers' Linseed Cake Co. 7 Ch. D. 533. Compare with case last cited, Potter & Brown's Appeal (V.-C. Hall), W. N. 1878, p. 81, affirmed by the Court of Appeal May 15, 1878.

(s) See Hoole v. Gt. Western Rail. Co. 3 Ch. 262; West Cornwall Rail. Co. v. Mowatt, 12 Jur. 407; 30 & 31 Vict. c. 131, § 25, and as to cost-book compa-

nies, 32 & 33 Vict. c. 19, § 12. See, also, *infra*, p. 619.

(t) See Electric Telegraph Co. of Ireland, 22 Beav. 471; Jennings v. Badely, 3 K. & J. 78; *ante*. p. 222.

(u) See the cases in the last note, and Fisher v. Taylor, 2 Ha. 218.

(v) See Bryon v. Metropolitan Saloon Omnibus Co. 3 DeG. & J. 123; and

of a company cannot be increased against the will of a \*single dissentient shareholder, there is, apparently, an exception in the case of cost-book mining companies. It is stated by Mr. Tapping, in his useful essay on the cost-book, that the capital of a cost-book mining company may be increased in pursuance of a resolution of a special general meeting. (x) No authority is cited for this statement, but it certainly is the constant practice of cost-book companies, which have spent all their capital, to make further calls on their shareholders, and to proceed against them in the Stannary court in case of non-payment. But it must not be overlooked that the capital of a true cost-book company is seldom if ever fixed beforehand (y), and that shareholders in cost-book mining companies have the power of relinquishing their shares if all calls upon them have been paid up; and that if they do not choose to avail themselves of this power, they may with propriety be treated as agreeing to go on, and to furnish more capital, should it be found necessary, for the purposes of the mine.

Increasing capital of cost-book mining companies.

Passing now to the various statutory enactments bearing upon the capital of companies, it may be observed, that there is no statutory provision relating to the capital of banking companies governed by 7 Geo. 4, c. 46, nor to that of companies governed by the Letters Patent act of 7 Wm. 4 & 1 Vict. c. 73.

Statutory enactments relating to capital, &c.

*Companies governed by the Companies clauses consolidation act.*

The capital of companies incorporated by special act of Parliament is determined by such act, and is divided into shares of the number and amount thereby prescribed. (z) And by the Companies clauses consolidation act it is enacted, that the subscribers shall pay the sums subscribed by them respectively, or such portions thereof as shall from time to time be called for by the company (a); and the company is empowered to make calls on the shareholders (b), and so enforce

Capital of companies governed by 8 & 9 Vict. c. 16.

*Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733, noticed *ante*, p. 274.

*Mitchell*, 4 Ex. 540, noticed *ante*, p. 613.

(x) Tapping on the Cost-Book, p. 22.

(a) 8 & 9 Vict. c. 16, § 21.

(y) See *ante*, pp. 146, 147.

(b) *Ib.* § 22.

(z) See *Ambergate, &c., Rail. Co. v.*

payment by action (*c*), and to forfeit the shares of defaulters. (*d*)

\*617 \*Subject to certain restrictions, new shares in these companies may be issued at a discount. (*e*) The act in question does not itself confer any power to borrow, but it contains important provisions relating to the borrowing of money by companies empowered to borrow by their special acts (*f*), and enacts that money authorized to be borrowed may, unless it be otherwise provided by the special act, be raised by the creation of new shares (*g*), which, with reference to the payment of calls, are to be on the same footing as original shares (*h*), and are to be offered to the existing shareholders if the old shares are at a premium. (*i*) It is also declared, that it shall be lawful for the company to convert or consolidate shares wholly paid up into capital stock, to be divided amongst the shareholders according to their respective interests therein (*k*); and provision is made for registering the owners for the time being of such stock and for the transfer thereof, and for securing to the holders such rights as they would have enjoyed if their shares had not been converted into capital stock of the company. (*l*) The act authorizes the directors to receive payment from any shareholder of the whole amount of his shares, and to pay him interest on the difference between such amount and the amount of calls actually made in respect of the same shares. (*m*)

The company's moneys are to be applied first in payment of the expenses incurred in obtaining the special act, and secondly in carrying out the objects of the company. (*n*)

The Companies clauses act, 1863 (*o*), contains some further important provisions relative to additional capital and debenture stock of companies governed by special acts of Parliament. The act in question does not confer any power to increase capital, or to issue preference shares, or to create debenture

26 & 27 Vict.  
c. 118.

(*c*) Ib. § 23.

(*d*) Ib. § 29.

(*e*) See 26 & 27 Vict. c. 118, § 21, as amended by 30 & 31 Vict. c. 127, § 27, and by 32 & 33 Vict. c. 48, §§ 5-7.

(*f*) 8 & 9 Vict. c. 16, § 38, *et seq.*

(*g*) Ib. § 56.

(*h*) Ib. § 57.

(*i*) 8 & 9 Vict. c. 16, § 58. See *Pearson v. London and Croydon Rail. Co.* 14 Sim. 541, as to the time within which a

shareholder must accept the offer.

(*k*) 8 & 9 Vict. c. 16, § 61.

(*l*) Ib. §§ 62-64. Stock will pass under a bequest of shares. See *Morrice v. Ayimer*, 10 Ch. 148.

(*m*) Ib. § 24.

(*n*) Ib. § 65. See, also, 27 & 28 Vict. c. 121, §§ 3 *et. seq.*

(*o*) 26 & 27 Vict. c. 118; amended by 30 & 31 Vict. c. 127, and 32 & 33 Vict. c. 48.

ture \*but only regulates the mode of exercising such pow- \*618  
ers where they are conferred by the company's special act.

There is one provision, however, relating to the rights of prefer-  
ence shareholders which requires special notice. The <sup>Preference</sup>  
provision in question (§ 14) is to the effect that prefer- <sup>shareholders.</sup>  
ence shares or stock shall be entitled to the preferential dividend or  
interest assigned thereto out of the profits of each year in priority  
to the ordinary shares and stock of the company; but if in any  
year there are not profits available for the payment of the full  
amount of preferential dividend or interest for that year, no part  
of the deficiency shall be made good out of the profits of any subse-  
quent year, or out of any other funds of the company. Prior to the  
passing of this act, it had been held that preference shareholders  
were entitled to have any deficiency of profit in one year made good  
out of the profits of a subsequent year, even although nothing  
might be left for the ordinary shareholders. (*p*) The enactment al-  
tering this rule only extends, it is conceived, to preference shares  
issued under some special act passed after July, 1863.

*Companies governed by the Companies act, 1862.*

The capital of a company formed under the act of 1862, and lim-  
ited by shares, must be specified in the memorandum of association (§ 8), and the capital of other companies  
formed under the act, and having a capital divided into <sup>Capital of com-  
panies govern-  
ed by 25 & 26  
Vict. c. 89.</sup>  
shares, must be specified in the registered articles (§ 14).

The number and amount of the shares into which the capital is  
divided must also appear in the memorandum or articles, as the case  
may be (§§ 8 and 14); and the shares must be numbered (§ 22);  
but the omission to number them \*will not prevent their \*619  
holder from being a contributory in respect of them (*q*).

(*p*) See as to preference shares, Webb  
*v. Earle*, 20 Eq. 556; Bangor and Port  
Madoc Slate Co. *ib.* 59; *Henry v. Great*  
*Rail. Co.* 1 DeG. & J. 606, and 4 K. &  
J. 1; *Sturge v. Eastern Union Rail. Co.*  
7 DeG. M. & G. 158; *Crawford v. North*  
*Eastern Rail. Co.* 3 K. & J. 723; *Stev-*  
*ens & South Devon Rail. Co.* 9 Ha.  
313; *Matthews v. Great Northern Rail.*  
*Co.* 5 Jur. N. S. 234; *Coates v. Not-*  
*tingham W. W. Co.* 30 Beav. 86; *Corry v.*  
*London & Enniskillen Rail. Co.* 29 Beav.

263; *Smith v. Cork and Bandon Rail.*  
*Co. Ir. L. R.* 3 Eq. 356, and 5 *ib.* 65,  
where the preference shareholders es-  
tablished their right to many years, ar-  
rears. In *Griffith v. Paget*, 6 *ch. D.*  
511, preferred and deferred shareholders  
were held entitled to share the capital of  
a company being wound up in propor-  
tion to their respective shares.

(*q*) See *Ind's case*, 7 *Ch.* 485. See  
*ante*, p. 132, as to numbering shares.

Whether fully paid-up shares in limited companies formed under this act can be issued at a discount has not been decided. (*r*)

The original capital may be increased by the issue of new shares (§§ 12 and 50) (*s*); but notice of the increase must be given to the registrar of joint-stock companies. (§ 34)

The capital of a company not limited by shares, may apparently be reduced (see §§ 14 and 50); but to reduce the capital of a company limited by shares was impossible as the act originally stood. (*t*) This, however, may now be done under the provisions of the Companies acts, 1867 and 1877 (*u*), and with the sanction of the Court (*x*); but not otherwise, *e.g.*, by buying up and cancelling shares. (*y*) But, as will be seen hereafter, inability to reduce capital does not prevent shares from being forfeited or surrendered in the usual way. (*z*)

These acts and the orders of Court relating to the reduction of capital will be found in the appendix to the present treatise. By reference to them it will be seen that—

1. Shares never taken up or agreed to be taken up by any person may be cancelled by a special resolution of the shareholders, and without any application to the Court. (*a*)

2. In all other cases an order of the Court having jurisdiction to wind up the company (*i.e.*, in England the Chancery \*620 \*Division of the High Court of Justice) is necessary in order to effect a reduction of capital. (*b*)

3. With such sanction and the approval of a special resolution

(*r*) See *ante*, p. 614; 30 & 31 Vict. c. 131, § 25, does not apparently authorize an issue of paid-up shares for less money than their nominal amount. Debentures may be issued at a discount, Regent's Canal Ironworks Co. 3 Ch. D. 43; Anglo-Danubian Steam, &c., Co. 20 Eq. 339; Campbell's case, 4 Ch. D. 470.

(*s*) See Campbell's case, 9 Ch. 1, as to the necessary meetings.

(*t*) See § 12, and the cases of Feiling and others, 2 Ch. 714; Sewell's case, 3 Ch. 131. Even a company which had power to reduce its capital lost it by being registered as a limited company,

Droitwich Patent Salt Co. *v.* Curzon, L. R. 3 Ex. 35.

(*u*) 30 & 31 Vict. c. 131, § 9 *et seq.*; 40 & 41 Vict. c. 26.

(*x*) § 11. For the practice of the Court in these matters, see the cases cited in the next note but one, and The General Mining Co. *Ir.* L. R. 6 Eq. 213.

(*y*) Hope *v.* International Financial Soc. 4 Ch. D. 327.

(*z*) Teasdale's case, 9 Ch. 54. Compare the last case.

(*a*) 40 & 41 Vict. c. 26, § 5.

(*b*) 30 & 31 Vict. c. 131, § 11.

of the shareholders, the capital may be reduced whether fully paid up or not, and whether lost or not. (*d*)

4. Where the reduction of the capital involves either the diminution of a shareholder's liability or the payment to any shareholder of any paid-up capital (*e*), notice of an intended application to the Court must be given to the creditors (*f*); and security must be given to those creditors who will not assent. (*g*)

5. The words "and reduced" must be temporarily added to the name of the company in all cases where the sanction of the Court to a reduction of capital is required, unless the Court dispenses with such addition (*h*); and the Court has only power to dispense with it where the reduction does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. (*i*)

6. The special resolution confirmed by the order must be registered. (*k*)

7. All copies of the memorandum of association issued after the reduction must be in accordance with it. (*l*)

Where the liability to calls is to be diminished or a division of paid-up capital is to be made (*m*), a time is fixed for creditors to come in and object, and if they do not come in within the time fixed for the purpose, they cannot afterwards effectually dissent. (*n*) But creditors who receive no notice of the intended reduction are entitled to be paid their debts not only \*by the \*621 company, but if necessary, by compelling the then members of it to contribute to their payment. (*o*)

Provision is also made by the Companies act, 1867, for subdividing a company's shares. This may be done by special Subdivision of shares. resolution, without the sanction of any court (*p*); but the proportion between the amount paid and unpaid on the exist-

(*d*) Ib. § 9, and 40 & 41 Vict. c. 26, § 3. Prior to this act the law was otherwise. See Ebbw Vale Steel, &c., Co. 4 Ch. D. 827; Kirkstall Brewery Co., 5 ib. 535, and compare Credit Foncier of England, 11 Eq. 356.

(*e*) See 40 & 41 Vict. c. 26, § 4.

(*f*) 30 & 31 Vict. c. 131, §§ 11 and 17.

(*g*) Ib. §§ 11, 13, and 14.

(*h*) Ib. § 10. The Court usually directs this addition to be used for three months, *Sharp v. Stewart and Co.* 5

Eq. 155; but see *Credit Foncier of England*, 11 Eq. 356, where fourteen days were fixed.

(*i*) See 40 & 41 Vict. c. 26, § 4.

(*k*) 30 & 31 Vict. c. 131, §§ 15, 16, and see 40 & 41 Vict. c. 26, § 4.

(*l*) 30 & 31 Vict. c. 131, § 10.

(*m*) 40 & 41 Vict. c. 26, § 4.

(*n*) *Credit Foncier of England*, 11 Eq. 356, foot-note.

(*o*) 30 & 31 Vict. c. 131, § 17.

(*p*) Ib. § 21.

ing shares must be preserved (*g*); and all copies of the memorandum of association issued after the subdivision must be in accordance with it. (*r*)

Notwithstanding the large powers given by the Companies act, 1862, to shareholders, and enabling them to modify their articles of association by special resolution (*s*), it has been held not competent for them to issue preference shares unless the articles as originally framed authorize such issue. (*t*) But it is otherwise if they do, although the memorandum of association is silent on the subject. (*u*) By the act of 1867, special resolutions may be passed authorizing arrangements on the issue of shares for a difference between their holders in the amount of calls to be paid, and the time of payment of such calls. (*x*)

The capital of companies governed by the Companies act, 1862, may be consolidated and divided into shares of larger amount, and may be converted into stock (§§ 12 and 50); but notice of any such change must be given to the registrar (§ 28).

The amount of a company's capital or stock, the shares into which the former is divided, and in which the latter is held, the persons to whom the shares or stock belong, the dates of transfers, and the amounts of calls paid and unpaid, must appear with other matters in the returns required to be made annually to the registrar (§§ 26 and 29).

By the regulations in Table A., the directors may, with the sanction of a special resolution of the members, increase the capital of the company by issuing new shares (No. 26). \*622 The \*amount of the increase and the amounts of the shares into which the increased capital is to be divided, rest with the members; but if they give no directions upon the subject, then with the directors (*ib.*). Unless the meeting authorizing the increase, give directions to the contrary, all new shares are to be offered to the members in proportion to the existing shares held by them (No. 27). Shares not accepted

(*g*) *Ib.*

(*r*) § 22. As to the illegality of subdividing otherwise than under the act, see the cases of Feiling and others, 2 Ch. 714.

(*s*) 25 & 26 Vict. c. 89, § 50.

(*t*) *Hutton v. Scarboro' Cliff Hotel*  
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Co., 2 Dr. & Sm. 514 and 521, and 9 Jur. N. S. 551. See as to the construction of articles on this point, *Melhado v. Hamilton*, 21 W. R. 874.

(*u*) *Harrison v. Mexican Rail. Co.* 19 Eq. 358.

(*x*) 30 & 31 Vict. c. 131, § 24.

by the members may be disposed of by the directors as they think most beneficial to the company (*ib.*). Any capital raised by the creation of new shares is to be considered as part of the original capital, and is subject to the same provisions as regards calls and forfeiture of shares (No. 28). (*y*)

By the same regulations, the directors may, with the sanction of the members, convert any paid-up shares into stock (No. 23, §§ 12, 28 and 34 of the act). The transfer of stock is, as far as practicable, subject to the same regulations as the transfer of shares (No. 24), and the rights of stockholders are assimilated, as nearly as circumstances will permit, to the rights of shareholders (Nos. 24 and 25; and see § 29 of the Act).

With respect to existing companies registered under the Act, the amount of their capital and the number of their shares, and the persons to whom they belong, and the amounts Capital of existing companies. paid on them must all be stated in the documents sent to the Registrar (§ 183); and if the capital has been converted into stock, the amount of such stock, and the persons entitled to it, must be similarly stated (§ 185). Shares in these companies need not be numbered if they were not numbered before registration (§ 196, cl. 2). Subject, however, to the provisions of any special act of Parliament, or letters patent, the foregoing remarks concerning the capital and shares of new companies appear to be applicable to existing companies after their registration (see § 196; and as to companies registered under the acts of 1856-1858, see §§ 176-178).

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## \*SECTION II.—OF CALLS.

\*623

Capitals of companies are usually raised by installments or *calls*.

"A call," is an expression used to denote both a demand for money, and also the sum demanded; and in this last Different kinds of calls. sense it signifies either the whole sum required to be

(*y*) Clauses similar to these were contained in Table B. to the act of 1856. They were discussed with reference to borrowing money, in *Bryon v. Metropolitan Saloon Omnibus Co.* 4 Jur. N. S. 680, and 3 DeG. & J. 123; Auxiliary

*Steam Clipper Co. v. Mounsey*, 4 K. & J. 733; and with reference to the issue of preference shares, in *Hutton v. Scarborough' Cliff Hotel Co.* 2 Dr. & Sm. 514 and 521, and *Harrison v. Mexican Rail. Co.* 19 Eq. 358.

raised at one time from the members of a company by a contribution amongst themselves, or that proportion of this entire sum which is payable in respect of each share.

There are two kinds of calls. First, there are those calls which are nothing more than the unpaid-up portions of the nominal capital of a company (*z*); and, secondly, there are those calls which are contributions required after that capital has been raised and exhausted. Calls of the first kind are payable by virtue of the agreement entered into by the subscribers and shareholders to contribute the sums fixed upon as the capital; but calls of the last kind are payable in consequence of the liability of shareholders to discharge their debts.<sup>(a)</sup> If this liability is unlimited, the amount of calls (of the second kind) which a shareholder may be compelled to pay, depends entirely on the amount of the debts to be liquidated, and upon the number of the solvent co-shareholders. But no shareholder can be required to pay calls of the first kind beyond his unpaid proportion of the capital of the company. In the ensuing pages it is proposed to examine the law respecting calls of the first kind, so far as it relates to the persons empowered to make them, the purposes for, and the manner in which they may be made, and the persons liable to pay them. The right to forfeit shares for the non-payment of calls, and the law relating to actions for their recovery, will be noticed in subsequent parts of the work.

\*624      \*1. *Of the persons by whom calls may be made.*

The terms of the instrument which regulates the internal affairs of each company must be ascertained before the persons empowered to make calls on its shareholders can be known. Generally speaking, this power is naturally vested in the directors of the company. There is no statutable provision upon this subject applicable to banking companies governed by 7 Geo. 4, c. 46; nor to companies governed by the Letters Patent act of 7 Wm. 4 & 1 Vict. c. 73. In ordinary cost-book companies calls are made by the shareholders. (*b*)

By whom calls  
may be made.

In companies  
governed by  
7 Geo. 4, c. 46,  
7 Wm. 4 & 1  
Vict. c. 73.

(*z*) Payments on allotment are not calls. See *Croskey v. Bank of Wales*, 4 Giff. 314.

(*a*) The difference here alluded to is illustrated by *Hull Flax Co. v. Welles-*

ley, 6 H. & N. 38, in which it was held that calls made by liquidators might be recovered, although the notices required for other calls had not been given.

(*b*) See 32 & 33 Vict. c. 19, § 10.

By the Companies clauses consolidation act the power to make calls is given to the company where its special act is silent on the subject (*c*); and it has been held, that this power is one which may be exercised by the directors, and that consequently a general meeting of the shareholders need not be held for the purpose of making a call. (*d*)

In companies governed by 8 & 9 Vict. c. 16.

By the schedule to the Companies act, 1862, the power of making calls is exercisable by the directors (*e*); and this rule applies to all companies limited by shares and formed under that act, and having no articles of association of their own. The act itself, however, is silent upon the subject, and leaves the authority to make calls to be settled by the regulations of each company.

Companies governed by the Companies act, 1862.

Where the power to make calls resides in the directors, a call made by those directors who are so *de jure* is valid, although an attempt may have been made to remove them, and other directors may have been (improperly) elected to take their place. (*f*)

Calls made by directors *de jure*.

It need hardly be observed, that a call, made by persons who have not the right to make it, is altogether invalid. (*g*)

Calls made by improper persons.

Where the power to make a call is exercisable by a certain \*number of persons collectively, a valid call cannot be made at a meeting at which less than the requisite number is present. The authorities on this point are numerous and conclusive. (*h*) However, in the Southampton Dock Company *v.* Richards (*i*), power to make calls was given by a special act of Parliament to the directors of a company, and it was held that a call made by a court of directors (*i. e.*, by three of them) was valid, inasmuch as in the act the expressions "the directors" and "a court of directors" were used indiscriminately.

Calls must be made by the requisite number of persons.

Southampton Dock Company *v.* Richards.

(*c*) 8 & 9 Vict. c. 16, § 22.

(*d*) *Ib.* § 90. See *Ambergate, &c., Rail. Co. v. Mitchell*, 4 Ex. 540.

(*e*) Table A., No. 4.

(*f*) *Swansea Dock Co. v. Levein*, 20 L. J. Ex. 447.

(*g*) See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151. The general issue raised the question of validity. \**South-*

*Eastern Rail. Co. v. Hebblewhite*, 12 A. & E. 497.

(*h*) See *Kirk v. Bell*, 16 Q. B. 290, and similar cases cited *ante*, p. 244, and compare *Thames Haven Dock Co. v. Rose*, 4 Man. & Gr. 552.

(*i*) 1 Man. & Gr. 448. *Southampton Dock Co. v. Arnett*, *ib.*

## 2. *The purposes for which calls may be made.*

*First, as to starting the company.*

It has been seen already that a person who agrees to take shares in a company formed for a given purpose, and with a given capital, is not bound to accept shares in a company formed for another purpose, or with a different capital; and it follows from this that a variation in the original scheme, if unassented to by a subscriber to it, affords an answer to any application for calls which may be made upon him. (*k*). And if no concluded agreement has been entered into, binding an allottee of shares to accept them, and to become a shareholder, he cannot be liable to calls. (*l*) But if a subscriber to a company binds himself to take shares in a company which may differ, more or less, from that originally proposed to be formed, he cannot set up a variation in the original scheme as an answer to a demand for payment of the capital he has undertaken to contribute. (*m*) Again, although the whole of a company's intended capital has not been subscribed, it does not follow that those who have subscribed are not bound to furnish funds to enable it to commence operations. If by a company's special act or charter the subscription of the whole, or a definite part of the proposed capital is made a condition precedent to the right to require payment of anything from those who have subscribed, effect must be given to such a condition (*n*); but there is nothing in any general act now in force having any such effect (*o*); and consequently, where there is no special act or charter affecting the question, the liability of a subscriber to a company to contribute to its capital before the whole has been subscribed for, depends entirely upon the contract into which he may have entered; and there are several instances in

Calls made to start a company.

Calls on allottees of scrip, &c.

Before the whole capital has been subscribed.

(*k*) See *Galvanized Iron Co. v. Westoby*, 8 Ex. 17.

(*l*) *Duke v. Andrews*, 2 Ex. 290.

(*m*) *Ante*, pp. 109 *et seq.* and p. 159; *Midland, &c. Rail. Co. v. Gordon*, 16 M. & W. 804; *Cork and Youghal Rail. Co. v. Paterson*, 18 C. B. 414; *Norman v. Mitchell*, 5 DeG. M. & G. 648, and 19

*Beav.* 278. See, too, *Kidwelly Canal Co. v. Raby*, 2 Price, 93.

(*n*) *Norwich and Lowestoft Nav. Co. v. Theobald*, 1 Moo. & M. 151.

(*o*) There was a clause to the effect in question in the repealed act relating to banking companies formed after May, 1844. See 7 & 8 Vict. c. 113, § 5.

which persons have been held bound so to contribute, although the whole capital of the company which they had joined had not been subscribed for. *Primâ facie*, however, they are not so bound (*p*); and in all the cases in which they were held bound, the defendants had entered into a contract which precluded them from maintaining that the subscription of the whole of the originally proposed capital was an express or implied condition to their becoming shareholders. (*q*)

With respect to companies formed under the Companies act, 1862, and having no special articles of their own, it is conceived that the directors have power to commence business, and make calls before the whole capital is subscribed for. (*r*)

*Secondly, as to carrying on the business of the company.*

The unpaid-up instalments of a capital, agreed to be subscribed for a given purpose, cannot be lawfully required to be paid up for any purpose other than that to which the capital \*itself is by agreement properly applicable. In \*627 other words, a call cannot be lawfully made upon the shareholders of a company for any purpose not warranted by the constitution of that company. (*s*) If it is made by the proper authority, in the proper form, and for a purpose which is not improper, then although some of the shareholders may disapprove of it, the call will be valid, and a court will not take upon itself to decide whether it ought or ought not to be made, but will leave that question to the decision of the shareholders themselves. (*t*) But

Calls made to continue the company's business.

(*p*) See *Fox v. Clifton*, 6 Bing. 776, and *North Stafford Steel Co. v. Ward*, L. R. 3 Ex. 172.

(*q*) See *Hutt v. Giles*, 12 M. & W. 492; *Waterford, Wexford, &c., Rail. Co. v. Dalbiac*, 6 Ex. 443; *London and Continental Ass. Co. v. Redgrave*, 4 C. B. N. S. 524; *Norman v. Mitchell*, 5 DeG. M. & G. 648, and 19 Beav. 278.

(*r*) *Ornamental Pyrographic Co. v. Brown*, 2 H. & C. 63, and *McDoughal v. Jersey Hotel Co.* 2 Hem. & M. 528; *Lyon's case*, 35 Beav. 646. *Howbeach Coal Co. v. Teague*, 5 H. & N. 151, however, contains dicta to the contrary; and see

*North Stafford Steel Co. v. Ward*, L. R. 3 Ex. 172, which, however, turned on the articles.

(*s*) In an action for calls this defense was open on a plea of never indebted. *South-East Rail. Co. v. Hibblewhite*, 12 A. & E. 497.

(*t*) *Yetts v. Norfolk Rail. Co.* 3 DeG. & S. 293; *Cooper v. Shropshire Union Rail. & Can. Co.* 6 Rail. Ca. 136, and 13 Jur. 443. See, also, *Orr v. Glasgow Rail. Co.* 3 McQu. 799, where the money already obtained was applied to a purpose which was improper, unless sanctioned by a majority of shareholders.

if a call is made for a purpose not warranted by the constitution of the company, such call will be invalid, and a court will interfere, even at the instance of one single dissentient shareholder, to prevent the making of such a call. The authorities bearing upon this subject will be adverted to hereafter, when the principles which guide the Court in interfering in matters connected with the internal affairs of companies come to be discussed. There appears to be no objection in principle to making calls to meet prospective and estimated expenses; but it seems that in ordinary cost-book companies such calls were considered improper. (*u*)

The power of making a call must be exercised as a trust (*x*), so as not to oppress or favor one shareholder, or set of shareholders, more than another; and if a call, which ought to be made on all the shareholders rateably, is made on some of them exclusively of the others, redress may be had. (*y*) So, if a call is made on one shareholder only, with a view to enable him to make default and have his shares forfeited, and thus get out of the company, the call, and all the proceedings \*founded upon it, will be nugatory as against the other shareholders. (*z*)

A creditor who has obtained judgment against a company and cannot obtain satisfaction by execution in the ordinary way, has been held not entitled to a mandamus to compel the company to pay him by means of a call. (*a*) But as before the Judicature acts a court of equity would, so now it is submitted any Division of the High Court will, if necessary, assist a person entitled to payment out of the funds of a company by making a call on the shareholders, and compelling them to furnish so much of the unpaid-up capital as may be required to liquidate the demand upon them. (*b*) Whether they can

(*u*) Such calls can, however, now be made for the estimated expenses of three months. See 32 & 33 Vict. c. 19, § 11.

(*x*) See Gilbert's case, 5 Ch. 559.

(*y*) Preston v. Grand Coll. Dock Co. 11 Sim. 327. Compare Mangles v. Grand Coll. Dock Co. 10 ib. 519; Bailey v. Birkenhead, &c., Rail. Co. 12 Beav. 433. Yetts v. Norfolk Rail. Co. 3 DeG. & S. 293. These cases will be considered hereafter.

(*z*) Richmond's case and Painters' case, 4 K. & J. 305.

(*a*) R. v. Victoria Park Co. 1 Q. B. 288. See, also, the York Building Co. 2 Atk. 56.

(*b*) Law v. London Indisputable Pol. Co. 1 K. & J. 223; Durham's case, 4 K. & J. 517; Talbot's case, 5 DeG. & S. 386. The 7 & 8 Vict. c. 113, § 31, provided for making calls for the indemnity of a shareholder who had been compelled to pay a debt of the company. No act now in force contains any such provision; but his right to indemnity in such a case is clear. Whether his remedy would be

be compelled to furnish more than their respective unpaid-up installments depends in each case upon the constitution of the company, *i. e.*, upon whether the liability of the shareholders is limited or unlimited.

The amount of each call (meaning thereby an instalment of capital) (*c*), is generally fixed by those to whom the power of making calls is entrusted. Where there is no special provision in a company's act, charter, or regulations, limiting the amount of each call, that amount must be considered discretionary, subject only to the limits which are set, first, by the rule that no call can be made upon the shareholders of any company for any purpose not warranted by the constitution of that company; and secondly, by the rule that the shareholders are not bound to contribute more than the capital which may have been agreed upon. Statements are sometimes made in prospectuses that it is not intended to call up more than part of the capital; but such statements afford no defense to a call for more than the amount stated. A statement of a present intention does not preclude a subsequent change.

\*Whether a call can be made on persons who have once paid up their shares in full but to whom part of the paid-up capital has been returned, is a question which turns on the true construction of the act, charter, or other instrument, conferring the power to make calls. But unless there are words showing the contrary, the power to make calls in such a case would be considered as exhausted. It would not, however, follow that the returned capital could not be recovered back. (*d*)

Calls not paid on the day fixed bear interest at rates varying in different companies; in the cases of companies governed by 8 & 9 Vict. c. 16, the rate is 4 per cent., see §§ 23 and 25 (*e*); and in companies governed by 25 & 26 Vict. c. 89, and Table A, the rate is 5 per cent., see Table A, No. 6. Calls made by cost-book companies may be made to bear interest at 5

by action or by a petition to wind-up would depend on circumstances.

(*c*) *Ante*, p. 623.

(*d*) See the Companies clauses cons. act, 1845, § 121, and as to registered companies, compare the Cardiff Coal Co. 11 W. R. 1007. with Cardiff Coal Co. *v.* Norton, 2 Eq. 558 and 2 Ch. 405; Strin-

ger's case, 4 Ch. 475; Rance's case, 6 ib. 104.

(*e*) The act says lawful interest. The interest should not be added to the principal and be claimed with it as part of the call. See Southampton Dock Co. *v.* Richards, 1 Man. & Gr. 448.

per cent. (*f*) Interest on calls made in winding-up proceedings will be alluded to hereafter.

### 3. *Of the manner of making calls.*

In order that a call may impose any obligation on those on whom it is made, it must be made not only by the proper authority, but in the proper manner. (*g*) What is the proper manner varies in different companies, but there are a few rules applicable generally to making calls to which it will be convenient at once to advert.

Except so far as irregularities may have been waived (*h*), it seems that an irregularity in making a call renders it invalid; and an irregularity in giving notice of it precludes the company from enforcing its payment against a person who has not received a proper notice. (*i*) But after judgment has been \*630 \*recovered in an action for a call, such judgment will not be set aside on the ground that the call was improperly made; although the defendant may only have become acquainted with its invalidity since the judgment was obtained against him. (*k*)

The irregularities which are generally relied upon as exonerating a shareholder from the payment of a call may be reduced to two kinds, viz. (1), those which affect the resolution for the call, and (2), those which affect the notice requiring payment of a call which has been made. It may be useful to refer to each of these in turn.

1. *As to the resolution making the call.* It has been already seen that the resolution to be valid must be made by those persons with whom the power to make the call lies, and also by a competent number of such persons. (*l*) It has also been seen, in an earlier part of the treatise, that what takes place at a meeting improperly convened is not legally valid, and is

(*f*) 32 & 33 Vict. c. 19, § 12.

(*g*) In an action for calls, never indebted put in issue the propriety of the manner in which they were made. *South-Eastern Rail. Co. v. Hebblewhite*, 12 A. & E. 497; *Shropshire Union Rail. Co. v. Anderson*, 3 Ex. 401; *Welland Rail. Co. v. Blake*, 6 H. & N. 410.

(*h*) *British Sugar Refining Co.* 3 K. &

J. 408.

(*i*) See *Miles v. Bough*, 3 Q. B. 845, where the defendant had actually promised to pay the call.

(*k*) *Thames Haven Dock Co. v. Hall*, 5 Man. & Gr. 274; and *The same Co. v. Rose*, 4 ib. 552.

(*l*) *Ante*, p. 625.

not binding upon those who have not, by their own acts, precluded themselves from objecting thereto. If, therefore, a call can only be made at an extraordinary meeting, specially summoned for the purpose, a call made at a meeting not duly summoned for that purpose will be invalid. But if a call can be made at an ordinary meeting not specially convened, it may also be made at an adjourned ordinary meeting, although such meeting may have been convened specially by a notice not stating the purposes for which it was to be held, and although the notice was not sent to everybody entitled to be present. (*m*)

Although the persons making a call may also be required to determine when, where, and to whom the call is to be paid, it is not necessary that they should do this by the resolution [making the call. It is sufficient if these particulars are stated in the notices issued in pursuance of such resolution. (*n*)

Resolution need not state when, where, or to whom a call is to be paid.

A call may be made prospectively, *i.e.*, it may be resolved to-day that a call be made a month hence, and be payable a \*month after that. (*o*) So, a call may be made payable by instalments. (*p*) But a power to make calls, as from time to time may be thought necessary, does not authorize those entrusted with the power, in calling up the whole capital at once, and make the same payable by instalments, so as to save themselves the trouble of determining at future periods whether any call should be made or not. (*q*)

Prospective calls.

It is frequently provided that no call shall be made at less than a certain interval of time since the making of the last call; and considerable difficulty has been felt in determining the exact time at which a call can be said to be made. After some hesitation, the courts have determined that a call must be considered as made when a resolution that it be made is duly

Intervals between successive calls.

(*m*) See *Wills v. Murray*, 4 Ex. 843; see *ib.* p. 862.

(*n*) *Newry, &c., Rail. Co. v. Edmunds*, 2 Ex. 118; *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574; *Great Northern Rail Co. v. Biddulph*, *ib.* 243.

(*o*) See *Sheffield, &c. Rail. Co. v. Woodcock*, 7 M. & W. 574.

(*p*) *Ambergate, &c. Rail. Co. v. Norcliffe*, 6 Ex. 629; *Lawrence v. Wynn*,

5 M. & W. 355; *Northwestern Rail. Co. v. McMichael*, 6 Ex. 273; *Birkenhead, &c. Rail. Co. v. Webster*, *ib.* 277; *Ambergate, &c. Rail. Co. v. Coulthard*, 5 Ex. 459. As to an action of *debt* for the recovery of instalments before all are due, see the last three cases.

(*q*) *Stratford and Moreton Rail. Co. v. Stratton*, 2 B. & Ad. 518.

passed (*r*); and this view has been adopted by the legislature so far as regards companies registered under the Companies act, 1862, and having no special regulations of their own. (*s*) Where, therefore, a certain time is required to elapse between the making of two successive calls, that time must be reckoned from the day on which the resolution for the first call is passed, up to the day on which the resolution for the second call is passed; and if this period is too short, the call will be invalid (*t*); and if the time required to elapse between the calls is so many days at least, neither of the days on which the calls are made ought to be included in the reckoning. (*u*)

If a call is made too soon, and is then abandoned, in order \*632 to \*be replaced by another duly made, the irregular call should be declared void before the second is made. (*x*)

A call will not be held invalid simply because the minutes of the meeting making it were signed after the meeting was over. (*y*) In *Cornwall Great Consolidated Mining Company v. Bennett* (*z*), the question whether a call could be made by a resolution not reduced to writing and signed was raised, but not decided. The judges differed upon that point, but they agreed that there must be some better evidence of the making of a call than a minute neither signed nor confirmed until after the action was commenced.

2. *As to the notice of the making of a call.*—Inasmuch as a call is to be considered as made when a resolution that it be made is duly passed, and inasmuch as it would be very hard upon any person liable to pay a call to treat him as in default unless he has had notice of the making of a call, it is held that such notice must be given to him before he can be dealt with as a defaulter; and this rule applies not only where notice is expressly required to be given by the company's act, charter, or deed of set-

(*r*) See *R. v. Londonderry Rail. Co.* 13 Q. B. 998, and 6 Rail. Ca. 1, sub nomine *Ex parte Tooke*; *Shaw v. Rowley*, 16 M. & W. 810; *Great North of England Rail. Co. v. Biddulph*, 7 M. & W. 243. See, as to calls made prospectively, *Sheffield, &c. Rail. Co. v. Woodcock*, 7 M. & W. 574.

(*s*) 25 & 26 Vict. c. 89, Table A. No. 5.

(*t*) See the cases in the last note but

one, and *Stratford and Moreton Rail. Co. v. Stratton*, 2 B. & Ad. 518.

(*u*) See *Watson v. Eales*, 23 Beav. 294.

(*x*) *Welland Rail. Co. v. Berrie*, 6 H. & N. 416.

(*y*) *Miles v. Bough*, 3 Q. B. 845, and see *ante*, p. 551.

(*z*) 5 H. & N. 423.

tlement, but also where there is no express provision upon the subject, and the shareholder has entered into an absolute covenant to pay such calls as may be made. (*a*) Indeed, in one case it was said, that the notice made the call (*b*); but this is not in conformity with the rule now established. (*c*)

The notice, to be valid, must be in such form, if any, as may be required by the regulations of the company; and where a notice is required to be signed by the directors, it will not be sufficient if their signatures are affixed by a clerk. (*d*)

Form of notice.

A notice requiring payment to the account of a person at a particular bank, is equivalent to a notice to pay to that person. (*e*)

\*A list of persons prepared by a deceased clerk whose business it was to send the notices, and ticked or marked by him so as to show that notices were sent to the persons on the list, is admissible in evidence to prove that a notice was sent to them. (*f*)

Evidence of notice having been given.

The notice must be given in the manner required by the act or regulations applicable to each particular company. (*g*)

Mode of giving notice.

By the Companies consolidation act it is provided (*h*), 1, that twenty-one days' notice at the least shall be given of each call; 2, that no call shall exceed the amount, if any, prescribed by the company's special act; 3, that successive calls shall not be made at less than the interval, if any, prescribed by the same act (*i*): 4, that the aggregate amount of calls made in any one year shall not exceed the amount, if any, prescribed by the same act; and 5, that all calls shall be paid to the persons, and at the times and places, from time to time appointed by the company. Under this act, therefore, there must first of all be a call made, and then at least twenty-one days' notice of it must be given (*k*), and the notice must state the person to whom, and the

In companies governed by 8 & 9 Vict. c. 16.

(*a*) *Miles v. Bough*, 3 Q. B. 845. See, too, *Edinburgh, &c. Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *Painter v. Liverpool Gas Co.* 3 A. & E. 433; and as to cost-book companies, 32 & 33 Vict. c. 19, § 10.

(*b*) *Shaw v. Rowley*, 16 M. & W. 810.

(*c*) *Ante*, p. 631, note (*r*).

(*d*) See *Miles v. Bough*, 3 Q. B. 845.

(*e*) *Ibid.* But see *The Leeds Bank-*

*ing Co.* 1 Ch. 150.

(*f*) *Eastern Union Rail. Co. v. Symonds*, 5 Ex. 237.

(*g*) See *Watson v. Eales*, 23 Beav. 294.

(*h*) 8 & 9 Vict. c. 16, § 22.

(*i*) See *Ambergate Rail. Co. v. Mitchell*, 4 Ex. 540.

(*k*) § 136 provides for giving notices by post.

place and time at which, the call is to be paid. The twenty-one days are reckoned from and exclusively of the day on which the notice is given. (*l*) If the notice states to whom, and when and where, the call is to be paid, it is immaterial whether the resolution for the call does the same or not. (*m*)

By the Companies act, 1862, it is provided (in Table A.) that the directors may, from time to time, make such calls upon the members, in respect of all moneys unpaid on their shares, as they think fit (No. 4); but twenty-one days' notice, at least, must be given of each call (No. 4). (*n*) The notice may be sent \*by post (No. 95). A call is made at the time when the resolution of the directors authorizing it is passed (No. 5).

The act makes calls specialty debts (§ 16), and gives a short form of pleading in an action for their recovery (§ 70).

#### 4. *Of the persons liable to pay calls.*

In order that a person may be liable to pay a call, meaning thereby a portion of the unpaid-up capital of a company, he must either have agreed to subscribe to such capital, or he must have become a shareholder in the company, or, thirdly, his liability must have devolved upon him as the representative of a subscriber or a shareholder. It will be convenient to allude—1, to subscribers; 2, to shareholders; 3, to the representatives of subscribers and shareholders.

1. *As to subscribers.*—There is no principle of common law which prevents a subscriber to an undertaking from being liable to calls before he has become an actual shareholder in the company he has agreed to join. His liability at common law depends entirely on the contract into which he has entered. But by several of the statutes relating to companies, a particular mode of proceeding for the recovery of calls is pointed out; and if that mode of proceeding applies, as it frequently does, to shareholders only (or their representatives), a person who is a

(*l*) *Re Jennings*, 1 Ir. Ch. 654, reversing on this point, *ib.* 236.

(*m*) *Newry, &c., Rail. Co. v. Edmunds*, 2 Ex. 118; *Sheffield, &c. Rail. Co. v. Woodcock*, 7 M. & W. 574; *Great Northern Rail. Co. v. Biddulph*, *ib.* 243.

(*n*) A notice by a company, which has changed its name since the call was made, may be given in the new name, *Shackleford, Ford & Co. v. Dangerfield*, L. R. 3 C. P. 407.

mere subscriber as distinguished from a shareholder, cannot be made to pay a call by that particular mode of proceeding (*o*), whatever obligation he may have incurred by agreeing to take shares and to contribute his quota of capital. (*p*)

By the Companies consolidation act, it is expressly declared that calls may be made on the subscribers as well as on the shareholders (*q*); and as was seen in an earlier part of the work, subscribers may be registered as shareholders without any express consent on their part, and when registered \*they may be sued as shareholders for \*635 calls. (*r*) But an allottee of shares who is not a subscriber, *i.e.*, who has not executed any instrument binding himself to contribute towards the capital of the company (*s*), cannot be sued for calls under the act in question. (*t*)

Subscribers to companies governed by 8 & 9 Vict. c. 16.

Under the Companies act, 1862, Table A., calls are only authorized to be made on the members. (*u*)

Subscribers to companies governed by the act of 1862.

2. *As to shareholders.*—Who are shareholders, the effect of being on or off the register of shareholders, the effect of acting as a shareholder without being one,—are matters which were discussed in Book I. Chap. 5. In the present place, therefore, it is proposed merely to recapitulate, as shortly as possible, the results formerly arrived at, so far as they relate to the particular question of liability for calls.

2. Calls on shareholder.

A person who has never become a shareholder in the proper sense of the word, and who is not estopped by his own conduct from denying that he is a shareholder, is not liable to calls as a shareholder, although he may have been registered as one. (*x*) Where a trustee is the person registered and recognized

Person must be a shareholder.

(*o*) See *Galvanized Iron Co. v. Westoby*, 8 Ex. 17; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341.

(*s*) *Thames Tunnel Co. v. Sheldon* 6 B & C. 341.

(*p*) For instances of successful actions against allottees on the contracts entered into by them, see *Duke v. Forbes*, 1 Ex. 356; *Duke v. Dive*, *ib.* 36; *Aldham v. Brown*, 7 E. & B. 164, affirmed on appeal, 6 Jur. N. S. 41.

(*t*) *Carmarthen Railway Co. v. Wright*, 1 Fos. & Fin. 282; *Waterford, Wexford, &c. Rail. Co. v. Pidcock*, 8 Ex. 279.

(*u*) 25 & 26 Vict. c. 89, Table A. No. 4; and as to who are members, see § 23 of the act, and *ante* p. 170.

(*q*) 8 and 9 Vict. c. 16, §§ 21, 22.

(*x*) *Galvanized Iron Co. v. Westoby*, 8 Ex. 17; *Waterford, Wexford, &c. Rail. Co. v. Pidcock*, 8 Ex. 279; *Carmarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282; *New Brunswick, &c. Rail. Co. v. Mug*.

(*r*) See, accordingly, *Mid. Rail. Co. v. Gordon*, 16 M. & W. 804; *Cork and Youghal Rail. Co. v. Paterson*, 18 C. B. 414, *ante* p. 110.

as a shareholder, his *cestui que trust* is not liable to the company for calls (*y*); and as a general principle, there must be some special ground for holding that a person who has no right as against a company to share profits, is compellable by the company to pay calls. (*z*)

At the same time, whether a person is actually a shareholder in a company or not, if he is estopped by his own conduct from denying that he is a shareholder, he cannot escape from the payment of calls properly made; and upon the ground of estoppel by conduct, subscribers to companies have frequently been held liable to calls as shareholders, although they had not complied with all the formalities necessary to render them shareholders in the strict sense of the word. (*a*)

A person who is a shareholder within the meaning of an act of Parliament which authorizes calls to be made on shareholders, is liable to calls made in pursuance of the act, although if his liability had not depended on statutory provisions, he might have been able to resist payment. Upon this ground it is that infant shareholders in railway companies are liable to calls (*b*), if they do not repudiate their shares. (*c*) So, a person

or be estopped  
from denying  
that he is one

\*636

escape from \*the payment of calls properly made;

Persons who  
are shareholders  
liable to  
calls.

geridge, 4 H. & N. 160, and 580. See, also, *Bloxam v. Metropolitan Cab Co.* 4 N. R. 51, where an injunction was granted.

(*y*) Not even in equity, see *Newry Rail. Co. v. Moss*, 14 Beav. 64.

(*z*) *Shropshire Union Rail. Co. v. Anderson*, 3 Ex. 401.

(*a*) *Hull Flax Co. v. Wellesley*, 6 H. & N. 38, where the shares were issued irregularly; *Cromford, &c. Rail. Co. v. Lacey*, 3 Y. & J. 80; *Burnes v. Pennell*, 2 H. L. C. 497; *Sheffield, &c. Rail. Co. v. Woodcock*, 7 M. & W. 574; *Cheltenham, &c. Rail. Co. v. Daniel*, 2 Q. B. 281; *London and Grand Junction Rail. Co. v. Graham*, 1 ib. 271; *Birmingham, Bristol, &c. Rail. Co. v. Locke*, ib. 256, in all of which the calls were recovered. Compare these with *Irish Peat Co. v. Phillips*, 1 B. & Sm. 598, in which they were not, and *Wolverhampton New Waterworks Co. v. Hawksford*, 6 C. B.

N. S. 336; 7 ib. 795; and 11 ib. 456, where an action for calls was partly successful and partly not. The defendant was held liable for calls made on shares properly issued and held by him, although there was no properly sealed register of shareholders; but he was held not liable for calls on shares not numbered or distinguished from each other, and in respect of which there was in truth no register at all. See *ante*, p. 157; and quare whether this case can be relied upon after *Portal v. Emmens*, 1 C. P. D. 201.

(*b*) *Cork and Bandon Rail. Co. v. Cazenove*, 10 Q. B. 935; *Leeds and Thirsk Railway Co. v. Fearnley*, 4 Ex. 26; *North-West. Rail. Co. v. McMichael*, 5 Ex. 114. Compare *Birkenhead, &c. Rail. Co. v. Pilcher*, 5 Ex. 121.

(*c*) *Newry, &c. Rail. Co. v. Coombe*, 5 Ex. 565; *Dublin and Wicklow Rail. Co. v. Black*, 8 Ex. 181.

who is a shareholder, and is as such under a statutory liability to pay calls, cannot escape from such liability on the ground that he was induced to become a shareholder by the fraud of the company; he must go further and show a repudiation of his shares, and that he is not in truth a shareholder (*d*); fraud and timely repudiation, however, afford a defense. (*e*) \*Again, in the case \*637 of a registered joint-stock company, the company being actually created by registration, and having, when created, all the powers conferred upon properly constituted companies, a call upon its shareholders will be valid, although the company ought not to have been registered; and a shareholder in such a company cannot escape from his liability to pay the call, upon the ground that things required to be done before registration have never been done at all. (*f*) So, in the case of a company incorporated by a special act, it is no answer to a call that the act was obtained by fraud. (*g*)

A person who, by being a shareholder, has once become liable to pay calls, continues to be so liable until he has ceased to be a shareholder, or until some valid agreement has been made between him and the company by virtue of which the company is precluded from treating him any longer as liable to pay calls. (*h*) If any such agreement has been made, it will afford a defense (*i*), although all the formalities required to be observed by out-going shareholders may not have been rigorously complied with. (*k*)

Duration of shareholder's liability to calls.

In most companies, shares are not transferable, so long as the owner is indebted to the company for calls. (*l*) Where this is the case, a person who has sold his shares, must pay all the calls made whilst the shares are registered in his name.

When shares have been sold.

(*d*) *Deposit Life Assur. Co. v. Ayscough*, 6 E. & B. 761. As to giving particulars of the fraud, see *McCreight v. Stevens*, 1 H. & C. 454.

(*e*) *Bwlchy Plwm Lead Mining Co. v. Baynes*, L. R. 2 Ex. 324. See *infra*, c. 10, § 3, as to rescinding contracts for fraud.

(*f*) *Banwen Iron Co. v. Barnett* 8 C. B. 406. See, too, *Agricultural Cattle Insur. Co. v. Fitzgerald*, 16 Q. B. 432.

(*g*) See *Waterford, &c. Rail. Co. v. Logan*, 14 Q. B. 672.

(*h*) See the cases of *Bosanquet v.*

*Shortridge*, 4 Ex. 699; *Shortridge v. Bosanquet*, 16 Beav. 84; *Bargate v. Shortridge*, 5 H. L. C. 297; *Taylor v. Hughes*, 2 Jo. & Lat. 24, noticed *ante*, pp. 137, 138.

(*i*) *Plate Glass Co. v. Sunley*, 8 E. & B. 47. The validity of the defendant's retirement in this case was admitted by the demurrer.

(*k*) See *Bargate v. Shortridge*, and *Taylor v. Hughes*, *ante*, pp. 137, 138.

(*l*) The subject of the transfer of shares will be alluded to hereafter.

before he or the purchaser can require the company to accept the latter as a shareholder in respect of the shares he has purchased (*m*); and so long as the purchaser is not a shareholder, the vendor continues to be one, and to be liable to calls. (*n*)

\*638 \*Shares are not unfrequently sold after a call has been made and before it has become payable; and if in such a

Effect of sale  
after call is  
made, but be-  
fore it is pay-  
able.

case the purchaser is accepted as a shareholder by the company, it may possibly find itself unable to sue either the vendor or the purchaser for the call after the time for its payment has elapsed. In *The Aylesbury Railway Company v. Mount (o)*, which was a case of this sort, turning on the provisions of a special act of Parliament, the Court of Common Pleas held, that the call could not be recovered from the transferor, and the Court of Queen's Bench held that it could not be recovered from the transferee (*p*); for the transferor was not a shareholder when the call became payable, and the transferee was not a shareholder when it was made; and the act in question was so worded as to render those only liable to be sued for calls who were shareholders at both those times. The Courts will not, however, so construe an act as to deprive the company of all remedy for the recovery of a call, if they can possibly avoid it; and as the obligation to pay is created by the making of a call, the person who was the shareholder when a call was made, is *prima facie* the person to pay it, whatever he may since have done with his shares.

In *The North American Colonial Association of Ireland v. Bentley (q)*, a company was incorporated by a special act, which provided for making calls on shareholders, and enacted that if at the time appointed for payment of a call, the holder failed to pay it, the company might sue such shareholder, and that it should be sufficient in an action for calls, to prove that the defendant was a shareholder at the time the call was made. The act also declared that shareholders who had sold their shares should remain liable for all future calls until transfers had been delivered to the secretary, and that no shareholder should be enti-

(*m*) *R. v. Londonderry, &c. Rail. Co.*  
13 Q. B. 998; *R. v. Wing*, 17 ib.  
645.

(*n*) See *London and Brighton Rail.*  
*Co. v. Fairclough*, 2 Man. & Gr. 674;  
*Humble v. Langston*, 7 M. & W. 517.

(*o*) 4 Man. & Gr. 651; reversed, but  
on purely technical grounds, 7 Man. &  
Gr. 898.

(*p*) *Aylesbury Rail. Co. v. Thompson*,  
2 Ra. Ca. 668.

(*q*) 15 Jur. 187, Q. B.

tled to transfer his share until he should have paid all calls due upon it. Upon these somewhat conflicting enactments, it was held, that a shareholder who had transferred \*his \*639 shares after a call had been made, but before it had become payable, was liable to be sued for the call; and it was considered clear that the transferee could not be sued for it, although the transfer had been delivered to the secretary of the company as contemplated by the act.

Again, in *Watson v. Eales* (*r*), which was the case of a cost-book mining company, one of the rules was, that no share should be transferred until all calls upon it were paid; and it was held that a transferee of shares in respect of which calls were in arrear, was not liable for such calls to the company, and that the company having recognized the transfer, could not forfeit the shares for non-payment of the calls.

*Watson v. Eales.*  
Cost-book  
company.

In the present state of the law, it cannot be said that there is any general rule determining whether the transferrer or the transferee of a share is liable to the company for calls made, but not paid before the transfer; for admitting the tendency to be in favor of holding the transferor liable, the statutory provisions generally applicable to the subject, are by no means uniform.

Result of the  
cases.

Under the Companies clauses act, the person liable is the shareholder at the time of making the call. (*s*)

This also appears to be the case with respect to companies governed by the Companies act, 1862, Table A. (*t*)

Statutory en-  
actments on  
this subject.

The right to forfeit shares for non-payment of calls, or for other reasons, will be examined hereafter; but it may be observed here, that both the Companies clauses consolidation act, and the Companies act, 1862, Table A., provide that an action for calls may be maintained, although the shares in respect of which they became due, have been forfeited for their non-payment (*u*). Where this double remedy is not expressly given, it will not be presumed; and in such a case

Forfeiture of  
shares for  
non-payment  
of calls.

(*r*) 23 Beav. 294.

(*s*) 8 & 9 Vict. c. 16, §§ 26, 27, *Bel-  
fast, &c. Rail. Co. v. Strange*, 1 Ex.  
739; *Birkenhead, &c. Rail. Co. v.*  
*Brownrigg*, 4 Ex. 426; *Wilson v. Birk-*  
*enhead, &c. Rail. Co.* 6 Ex. 626; *R. v.*  
*Londonderry, &c. Rail. Co.* 13 Q. B.  
998; *R. v. Wing*, 17 ib. 645. As to

who is a shareholder, see *ante*, p. 156.

(*t*) See 25 & 26 Vict. c. 89, § 70, and  
Table A. No. 4; but see, also, No. 6,  
which throws some doubt on the point  
as to who is a member. See *ante*, pp.  
170, 178.

(*u*) 8 & 9 Vict. c. 16, § 29; 25 & 26  
Vict. c. 89, Table A. No. 21. See great

\*640 forfeiture \*will be an answer to an action ( $\alpha$ ), provided the forfeiture was justifiable, and legally declared, but not otherwise. ( $\gamma$ )

3. *As to the representatives of subscribers and shareholders.*—

3. Calls on the representatives of subscribers and shareholders.

Executors.

In adverting to the liability of the executors of a deceased person to pay calls, it is necessary to distinguish calls made before, from those made after the testator's death. Calls made before his death are payable out of his estate ( $z$ ); and as to Companies governed by the Companies clauses consolidation act, or the Companies act, 1862, rank like ordinary specialty debts ( $\alpha$ ). Calls made after his death, are also payable out of his estate, if they are made whilst the shares are left in his name, and if he entered into any contract whereby he undertook to pay such calls as might be made upon his shares ( $\beta$ ). In order that this liability may attach to the estate of a deceased shareholder, it is not necessary that his executors should become shareholders in respect of his shares, or that they should have been named in the contract sought to be enforced against them. ( $c$ )

By the Companies clauses consolidation act it is expressly declared, that the executors of subscribers and shareholders shall pay the calls payable in respect of their testators' shares ( $d$ ); but this only means that the executors are to pay out of their testators' assets; and unless they have actually become shareholders themselves, they must be sued as executors, and not as shareholders, for such calls as may be sought to be recovered from them ( $e$ ). As a general rule it may be taken, that executors are never liable otherwise than in their representative capacity, unless they actually become shareholders. ( $f$ )

Calls not payable by executors personally.

Northern Rail. Co. *v.* Kennedy, 4 Ex. 417; Inglis *v.* Great Northern Rail. Co. 1 Macqueen, 112.

( $\alpha$ ) See Giles *v.* Hutt, 3 Ex. 18.

( $\gamma$ ) See Edinburgh, &c. Rail Co. *v.* Hebblewhite, 6 M. & W. 707.

( $z$ ) Fyler *v.* Fyler, 2 Ra. Ca. 813.

( $\alpha$ ) As to 8 & 9 Vict. c. 16, see Cork and Bandon Rail. Co. *v.* Goode, 13 C. B. 826; and as to 25 & 26 Vict. c. 89, see § 16. As to other companies. see Robinson's case, 6 DeG. M. & G. 572. Specialty debts now rank with simple

contract debts, 32 & 33 Vict. c. 46.

( $\beta$ ) Heward *v.* Wheatley, 5 DeG. M. & G. 628; Fyler *v.* Fyler, 2 Ra. Ca. 813; Wills *v.* Murray, 4 Ex. 843; Blount *v.* Hipkins, 7 Sim. 51.

( $c$ ) Ibid, and see Baird's case, 5 Ch. 725.

( $d$ ) 8 & 9 Vict. c. 16, § 21.

( $e$ ) Birkenhead, &c. Rail. Co. *v.* Cotesworth, 5 Ex. 226.

( $f$ ) Weald of Kent Canal Co. *v.* Robinson, 5 Taunt, 800.

But if they do become shareholders they become \*subject to the same obligations as other \*641 shareholders, and as between themselves and the company they are personally liable to calls, whatever the state of their testators' assets may be. (*g*)

Unless they are themselves shareholders. Trustees in bankruptcy.

If a shareholder becomes bankrupt, calls made before his bankruptcy are, and always were, clearly provable against his estate; and under the Bankruptcy act, 1869 (*h*), his liability to future calls is also provable. Therefore, his order of discharge is a bar to all calls; even although the trustee in bankruptcy may neither sell the shares nor disclaim them (*i*). The Bankruptcy act, 1869, goes much further in this respect than the previous statutes.

(*g*) See *Armstrong v. Burnet*, 20 (*h*) 32 & 33 Vict. c. 71, § 31.  
*Beav.* p. 435. *Spence's case*, 17 *Beav.* (*i*) § 23.  
 203.

## \*CHAPTER IV.

## OF JOINT AND SEPARATE PROPERTY.

THE expressions partnership property, partnership stock, joint stock, and joint estate, are used indiscriminately to denote everything to which the firm, or in other words *all* the partners composing it, can be considered to be entitled as such. (*a*) The qualification *as such* is important; for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property; *e.g.*, if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become partnership property and form part of the common stock in which they are interested as partners. (*b*) Whether it does so or does not, depends upon circumstances which will be examined hereafter.

It is often a difficult matter to determine what is to be regarded as partnership property, and what is to be regarded as the exclusive property of each partner. The question, however, is of importance not only to the partners themselves, but also to their creditors; for, as will be seen hereafter, if a firm becomes bankrupt, the property of the firm and the separate property of each partner have to be distinguished from each other, it being a rule to apply the property of the firm, in the first place in payment of the creditors of the firm, and to apply the separate properties of the partners in the first place to the payment of their respective separate creditors.

(*a*) The expression joint estate sometimes has a wider signification, including all property which, on the bankruptcy of the firm, is distributable amongst its creditors. See *post*, book iv. c. 2, Reputed Ownership.

(*b*) *Morris v. Barrett*, 3 Y. & J. 384, and see the judgment in *Ex parte The Fife Banking Co.* 6 Ir. Eq. 197, S. C. on appeal under the name of *Re Littles*, 10 ib. 275.

\*It is proposed, therefore, to examine the rules by which \*643 to determine what is the property of the firm, and what the separate property of its members.

It is for the partners to determine by agreement amongst themselves what shall be the property of them all, and what shall be the exclusive property of some one or more of them. Moreover, it is competent for them by agreement amongst themselves to convert what is the joint property of all into the separate property of some one or more of them, and *vice versa*. The determination, therefore, of the question, What is, and what is not the property of the firm? involves an inquiry into the three following subjects, viz :—

Joint estate.

Separate estate.

Conversion of one into the other.

Each of these will be examined in order.

#### SECTION I.—OF JOINT ESTATE.

Whatever at the commencement of a partnership is thrown into the common stock, and whatever has from time to time during the continuance of the partnership been added thereto and obtained by means thereof, whether directly by purchase or circuitously by employment in trade, belongs to the firm, unless the contrary can be shown. (c)<sup>1</sup>

(c) See *Crawshay v. Collins*, 2 Russ. 339, as to the patents; *Nerot v. Burnand*, 4 Russ. 247, and 2 Bli. N. S. 415; *Bone v. Pollard*, 24 Beav. 283. See, also, as to co-owners of mines not being co-partners; *Clegg v. Clegg*, 3 Giff. 222.

<sup>1</sup> A partner in a firm engaged in purchasing live-stock on commission died after certain commissions were partly earned. The surviving partner completed the transactions and received the money: *Held*, that such commissions should be treated as partnership assets, but that the surviving partner was entitled to have an allowance for his time and expenses in completing the trans-

actions. *Newell v. Humphrey*, 37 Vt. 265.

A judgment in a suit by two for a trespass alleged to be on firm property, is firm assets. *Collins v. Butler*, 14 Cal. 223.

On the termination of a partnership formed to plant and sell oysters, planted oysters remaining in the beds after payment of all partnership debts, are the common property of both partners, of which, as in case of any personal property held in common, one tenant in common cannot dispose of the share of the other without his authority. *Ruckman v. Decker*, 23 N. J. Eq. 283.

The mere fact that the property in question was purchased by one partner in his own name is immaterial, if it was paid for out of the partnership moneys; for in such a case he will be deemed to hold the property in trust for the firm, unless he can show that he holds it for himself alone. (d)<sup>3</sup> Upon

If such tenant in common turn over such property to a firm of which he becomes a member, such firm is accountable to the other tenant in common of the property, for the value of his share of the property so turned over and used by the new firm. *Ruckman v. Decker, sup. ra.*

Where C. and B. formed a partnership for the purpose of making, selling and letting chronometers, C. contributing all the capital, and B. giving labor only, and receiving a salary and a share of the profits, and C. agreed to put into the stock of such partnership certain chronometers which were his property, upon a stipulation "that they should be taken at a fair valuation, as a stock in trade, so that upon a sale of them at the usual market price, the profit usual in that branch of business might be made upon them," but this agreement never was reduced to writing as was intended, nor was a valuation ever fixed upon; and after dissolution of the firm, both partners remained in the store they had occupied as partners, and C. let the chronometers in his own name and kept his own accounts of them, and there was some evidence that it was understood between the parties that C. was to take the stock and pay the debts: *Held*, that after such dissolution the chronometers were the property of C., and that his lessee of one of them could recover it from B., who had taken it away from him. Upon such an agreement the chronometers did not become the property of the firm, but continued always the property of C., the firm having possession to use them. *Penny v. Black*, 9 Bosw. 310.

One of two partners cannot commit larceny or burglary as to the property or

house of the firm. *Alfele v. Wright*, 17 Ohio, 238.

(d) See *per Lord Eldon* in *Smith v. Smith*, 5 Ves. 193; *Robley v. Brooke*, 7 Bli. 90; *Morris v. Barrett*, 3 Y. & J. 384.

<sup>2</sup> If a person buys goods for a firm of which he is a member, the goods bought become the property of the firm, though he does not at the time disclose the name of his partner. *Scott v. McKinney*, 98 Mass. 344.

Where two members of a firm engaged in building a mill, bought, with their own means, lumber for that purpose, and delivered it on the ground where the mill was building, and the other partner, who had personal charge of the work, took possession of the lumber and applied it to the partnership uses as it was needed, with the knowledge of the two former, and without objection, these facts are enough to prove a conversion of all the lumber so bought and delivered into partnership property. *Person v. Wilson*, 25 Minn. 189.

A judgment upon a warrant of attorney given to one member of a partnership to secure a debt due the partnership, will be held by him, as trustee, for the benefit of the firm; and payment of the judgment will satisfy the partnership debt. *Chapin v. Clemitson*, 1 Barb. 311.

Where one permits another to buy stock on their joint account, in anticipation of forming a partnership, and immediately afterwards repudiates the agreement to become a partner, he is not entitled to any of the property bought, nor are his individual creditors. *Rice v. Shuman*, 43 Pa. St. 37.

As to when real estate is partnership property, see *post*, 652, note.

this principle it is held that land purchased in the name of one partner, but paid for by the firm, is the property of the firm, \*although there may be no declaration or memorandum in \*644 writing disclosing the trust, and signed by the partner to whom the land has been conveyed. (e)<sup>1</sup> So, if shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company in the name of one partner only, and although it may be contrary to the company's deed of settlement for more than one person to hold shares in it. (f)

As regards ships there was often a difficulty arising from the ship registration acts. For as it was clearly settled that a ship belonged, both at law and in equity, to the per-<sup>Ships.</sup> son or persons who were registered as her owners, and to no one else, it followed that if a ship had been bought with partnership money, had been used as partnership property, and had always been treated as such by all the partners, yet if she was registered in the name of one partner only, there was no method by which that one could be prevented from effectually asserting an exclusive right to the ship, and depriving his co-partners of all their interest in her. (g) The provisions of the present Merchant shipping acts differ, however, in several material respects from the enactments previously in force; and it is apprehended, that now, in the case

(e) *Forster v. Hale*, 5 Ves. 308, and 3 ib. 696.

<sup>1</sup> Where it appeared that real estate had been used by a partnership for a long series of years in the manufacture of iron, and that upon the death of any partner, his heirs at law, to whom the land descended, came into the partner in his place, and there was no proof of any articles of partnership: *Held*, that the whole partnership estate, whether consisting of real or personal property, was to be regarded in equity as a consolidated fund, to be appropriated primarily and exclusively to the satisfaction of partnership debts. *Goodburn v. Stevens*, 5 Gill, 1.

(f) *Ex parte Connell*, 3 Deac. 201;

*Ex parte Hinds*, 3 DeG. & S. 613.

(g) See *Slater v. Willis*, 1 Beav. 354; *Battersby v. Smyth*, 3 Madd. 110; *Camden v. Anderson*, 5 T. R. 709; *Curtis v. Perry*, 6 Ves. 739; *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; and as to the old law relating to equitable interests in ships, see an article by the author in the *Law Magazine* for May, 1862 (vol. xiv. p. 70, N. S.). If a ship was registered in the name of two partners, the shares in which they were interested might have been shown. See *Ex parte Jones*, 4 M. & S. 450. As to the right of one partner to sell or mortgage a ship belonging to the firm, see *Ex parte Howden*, 2 M. D. & D. 574.

above supposed, the registered partner would be deemed a trustee for the firm. (*h*)

645\* \*Strong as is the presumption that what is bought with partnership money is partnership property, the presumption

Cases where property paid for by the firm does not belong to it. may may be rebutted; *e. g.*, by showing that the money was lent by the firm to one partner, and so was not in fact, partnership money when invested (*i*.) Moreover, it is to be observed that property which has been used and treated as partnership property cannot be presumed to belong to one partner only, simply because he paid for it; for the presumption in such a case is rather that the property in question was his contribution to the common stock (*j*.) This subject will be adverted to more at length in the next section.

It has been already seen that one partner will not be allowed to retain for his own exclusive benefit any property which he may have acquired in breach of that good faith which ought to regulate the conduct of partners *inter se*. Whatever property has been so acquired, will be treated as obtained for the benefit of all the partners, and as being part of the assets of the firm; and this rule applies to property obtained by a continuing or surviving partner in breach of the good faith which he is bound to exercise towards a retired partner, and the representatives of a deceased partner so long as their interest in the partnership assets continues (*k*.)

At the same time, if an advantage which has been obtained by a partner is wholly unconnected with the partnership affairs, or being connected with them, has been conferred upon him with a view to his own personal benefit, he cannot be called upon to account for it to the partnership. For example, where a ship, belonging to a Frenchman and two Americans as partners, was captured by a British cruiser, and compensation was made to the Americans, but to them only, the Frenchman being expressly excluded, it was held that, the sum awarded to the

Money paid to one partner for his exclusive benefit. (*h*) 17 & 18 Vict. c. 104, §§ 37 and 43. and 25 & 26 Vict. c. 63, § 3. Upon the construction of the former act, see *Liverpool Borough Bank v. Turner*, 1 J. & H. 159, and 2 DeG. F. & J. 502. A ship may be registered in the name of a company, though some of its members are foreigners. See 17 & 18 Vict. c.

104, § 18; and *R. v. Arnaud*, 9 Q. B. 806.

(*i*) As in *Smith v. Smith*, 5 Ves. 193. See, also, *Walton v. Butler*, 29 Beav. 428; *Ex parte Emly* 1 Rose 64.

(*j*) See *Ex parte Hare*, 1 Deac. 25, per Sir J. Cross.

(*k*) See *ante*, p. 572 *et seq.*

Americans belonged to them alone, and that the Frenchman had no interest in it (l.) So, if one partner is \*the lessee of 646\* property to which the firm is only entitled so long as the partnership continues, and on the dissolution of the partnership the lease is sold or renewed, the price of the sold lease, or the renewed lease, as the case may be, will belong, not to the firm, but to that partner in whom the lease is by hypothesis exclusively vested (m.)

As regards property acquired after a dissolution, but before the affairs of a dissolved partnership have been wound up, such property is not necessarily to be considered as <sup>Property acquired after dissolution.</sup> partnership property, even though the partner acquiring it has continued to carry on the business of the dissolved firm without the consent of his late partners. This was decided in *Nerot v. Bur-*  
*nand* (n.) In that case, in effect, an hotel-keeper be- <sup>Nerot v. Bur-</sup>  
 queathed his business to his son and daughter. After <sup>nand.</sup> the death of the testator, the daughter continued to carry on the business. She afterwards transferred it to a new house in Clifford street, and this house was conveyed to her in fee. She continued to carry on the business there for some time, and ultimately she married. During the greater part of the time which had elapsed since the death of the testator, his son had been abroad, and on his return he insisted that he ought to be considered as a partner with his sister, and that as such he was entitled to have the new house taken by her, and all the stock in trade and effects purchased by her in order to carry on the business, treated as partnership property. The Vice-Chancellor decided that the testator's son and daughter had become partners, but that the partnership between them had been dissolved on her marriage. He also held, that the new house and all the goods, furniture, plate, linen, china, wines, stock-in-trade, implements and other effects, being in and about the premises, formed a part of the partnership property. Upon appeal this decision was affirmed, so far as it related to the existence and subsequent dissolution of partnership; but was varied so far as it related to what ought to be considered as partnership property. Upon this head the Lord Chancellor's judgment was as follows:

(l) *Campbell v. Mullett*, 2 Swanst. 551; See *Thompson v. Ryan*, 2 Swanst. 565, n.; *Moffat v. Farquharson*, 2 Bro. C. C. 338. See the note on this case in Belt's edition of Brown's Reports.

(m) See *Burdon v. Barkus*, 3 Giff. 412, aff. on appeal, 4 De G. F. & J. 42.

(n) 4 Russ. 247, and 2 Bli. N. S. 215. See, too, *Payne v. Hornby*, 25 Beav. 280.

\*647 \**"It appears to me satisfactorily made out from all the circumstances, that the house in Clifford street was bought with the partnership property; bought, in the first instance, partly with the partnership property, partly with money borrowed by Miss Nerot and afterwards repaid out of the partnership effects, and partly upon the credit of the house that belonged to the partnership, and I think that part of the Vice-Chancellor's decree by which he directs the house to be sold, must be affirmed.*

*"There is a part of the decree, however, in which I cannot concur. The dissolution of the partnership took place in September, 1819. The Vice-Chancellor has directed all the property to be sold which was in the house in Clifford Street at the time when the decree was pronounced, several years after the dissolution of the partnership, as if all the property which at the time of the decree existed in the house was, without enquiry, to be considered as partnership property. Lord Eldon doubted greatly whether that part of the decree could be sustained; and in my opinion it must be varied by directing the Master to take an account of the particulars of the partnership property which were in the house in Clifford Street at the time of the dissolution, and of the value of the property at that time; and to enquire whether any part of that property still remains in the house."* (o)

The good-will of a partnership, in so far as it has a pecuniary value, is now settled to be partnership property, unless the contrary can be shown. This subject, however, will be more conveniently discussed hereafter, when treating of partnership articles. (p)<sup>1</sup>

The question, What is property of a company, must as between the company and its members, be determined upon the principles above explained. It has already been seen that what directors may acquire in breach of good faith towards the shareholders must be accounted for to the company; and it has been decided that unissued shares in a company belong to the company, and that, although they may be placed at the disposal of the directors, the directors must account to the company for whatever they may receive in respect of such shares. (q) On the other hand the shares held by a director are his separate property, and he is in no sense a trustee of them for the company. (r)

(o) See, also, *Ex parte Morley*, 8 Ch. 1026, where a surviving partner continued the business, sold the old stock in trade and it was held that the new stock in trade formed part of his separate estate.

(p) See *infra*, book iii. ch. 9, § 3.

<sup>1</sup>The subscription list of a newspaper when published by more than one, is

partnership property; and when one of the partners die, it does not survive to the surviving partner, but belongs to, or is to be administered as part of, the joint estate. *Holden v. M'Makin*, 1 Pars. Sel. Cas. 270

(q) *Ante*, p. 588 *et seq.*

(r) *Gilbert's case*, 5 Ch. 559.

## \*SECTION II.—SEPARATE ESTATE.

\*648

The preceding enquiry into what constitutes the property of the firm, has rendered it necessary to enquire at length into what constitutes the separate property of its members. A few additional observations, pointing out the danger of relying too much on circumstances which are often regarded as decisive, may, however, be usefully added.

It by no means follows that persons who are partners by virtue of their participation in profits, are entitled as such to that which produces those profits. For example, coach proprietors who horse a coach and divide the profits, may each make use of horses which belong to himself alone and not to the firm of proprietors (*s*). So, where a merchant employs a broker to buy goods for him and to sell them again on his account, although it may be agreed that the profits are to be divided, the goods themselves, and the money arising from their sale, are the property of the merchant, and not the joint property of himself and the broker (*t*); and it not unfrequently happens that dormant partners have no interest in anything except the profits accruing to the firm to which they belong. (*u*)<sup>1</sup>

2. Property of the individual partners.

That which produces partnership profits may belong to one partner only.

(*s*) As in *Fromont v. Coupland*, 2 Bing. 170; *Barton v. Hanson*, 2 Taunt. 49, and see *Wilson v. Whitehead*, 10 M. & W. 503, as to an author's interest in paper supplied for his work to the publisher.

(*t*) *Smith v. Watson*, 2 B. & C. 401; *Meyer v. Sharp*, 5 Taunt. 74; *Burnell v. Hunt*, 5 Jur. 650, Q. B.

(*u*) See *Ex parte Hamper*, 17 Ves. 404, 405; *Ex parte Chuck*, Mont. 373.

<sup>1</sup> If partners, by arrangement among themselves, own each a separate part of the stock in trade on which the partnership business is transacted, the stock will nevertheless be regarded as partnership property for the payment of partnership debts, at least as to creditors who have no notice that the stock is owned in that way. *Elliot v. Stevens*, 38 N. H. 311.

Articles of partnership for manufac-

ture of carriages provided that the entire stock should be furnished by one partner; that the other was to have no interest or ownership in the capital stock, but should give his personal attention exclusively to the business; and that the net profits and losses should be equally divided: *Held*, that stock and tools of the factory manufactured by the partnership or purchased by it in the course of its business, was not the sole property of the partner furnishing the capital, but was joint property. *Snyder v. Lunsford*, 9 W. Va. 223.

Plaintiffs and defendant were engaged in carrying on business as partners, the articles of co-partnership providing that the capital contributed by the plaintiffs should belong to them respectively and exclusively. The plaintiffs purchased a lathe, and other machinery,

Again, it by no means follows that property used by all the partners for partnership purposes, is partnership property. For example, the house and land in and upon which the partnership business is carried on, often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all (*v*). So it sometimes happens,

\*649 though less \*frequently, that office furniture (*x*), and even utensils in trade (*y*), are the separate property of one of the partners, subject to the right of the others, to use them as long as the partnership continues. If, however, a partner brings such property into the common stock as part of his capital it becomes partnership property, and any increase in its value will belong to the firm. (*z*)

It does not even necessarily follow that property bought with the money of the firm is the property of the firm. For it sometimes happens that property, although paid for by the firm, has been, in fact, bought for one partner exclusively, and that he has become debtor to the firm for the purchase money. (*a*)

It is obvious, therefore, that the only true method of determining as between the partners themselves what belongs to the firm, and what not, is to ascertain what agree-

which were put in the shop in the custody of the defendant, who was to carry on the business, and one-half the cost of which machinery was, by one of the plaintiffs, credited to each of them upon the books of the firm: *Held*, that, by the credit of the cost of the machinery to the plaintiffs, the machinery became the property of the firm, and that, the same having been removed by the defendant, the plaintiffs could not maintain trover therefor. *Robinson v. Gillian*, 15 Hun, 267.

An entry in the partnership books by one of the partners in the business of a saw-mill, charging himself with a boat which he had built at the mill, may be introduced by him as evidence *inter alia* to prove the boat to be his individual property. *Reno v. Crane*, 2 Blackf. 217.

(*v*) See *Burdon v. Barkus*, 3 Giff. 412, aff. on appeal, 4 DeG. F. & J. 42, as to a lease of a coal mine; *Ex parte Mur-*

ton, 1 M. D. & D. 252; *Balmain v. Shore*, 9 Ves. 500; *Rowley v. Adams*, 7 Beav. 548; *Doe v. Miles*, 1 Stark, 181, and 4 Camp. 373. If there is no lease and the firm is dissolved, the owner can eject his late partners without notice to quit. *Doe v. Bluck*, 8 C. & P. 464; *Benham v. Gray*, 5 C. B. 138 (an action of trespass). As to an injunction in such cases, see *Elliot v. Brown*, 3 Swanst. 489, *n.*; *Hawkins v. Hawkins*, 4 Jur. N. S. 1044, V. C. Stuart.

(*x*) *Ex parte Owen*, 4 DeG. & Sm. 351. See *Ex parte Hare*, 1 Deac. 16; *Ex parte Murton*, 1 M. D. & D. 252.

(*y*) *Ex parte Smith*, 3 Madd. 63.

(*z*) *Robinson v. Ashton*, 20 Eq. 25.

(*a*) See *Smith v. Smith*, 5 Ves. 193; *Walton v. Butler*, 29 Beav. 423; *Ex parte Emly*, 1 Rose, 64. Compare the case of the Bank of England, 3 DeG. F. & J. 645, noticed *infra*, p. 649.

ment has been come to upon the subject. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. The following cases, in which there was very little evidence to show what agreement had been made, may be usefully referred to on this subject.

In *Ex parte Owen* (b) one Bowers, who was a grocer, provision dealer, and wine merchant, and who possessed stock in trade and household furniture at his place of business, took two partners, without any agreement except that they were to participate in the profits of the concern. They brought in no capital and paid no premium, and no deed or agreement was executed. Bowers bought with his own money, but in the name of the firm, new stock required for the business. Upon the bankruptcy of the firm, the question arose to whom \*the stock in trade and furniture belonged. The Court, \*650 coming to the best conclusion it could from such materials as were before it, held that there was an agreement between the three, expressed or implied, that all the stock in trade should become the property of the three, subject to an account, in which the partnership would be debited in favor of Bowers for the value of the articles which belonged to him or for which he paid. But the Court thought there was not the same ground for such an inference as to the household furniture, and that therefore was held to have continued and to remain the separate estate of Bowers.

In *Parker v. Hills* (c), which went to the House of Lords, the question was, whether a lease of certain saltworks belonging to Parker had, on his entering into partnership with Hills, become partnership property or not. The documentary and other evidence was such as to render the question extremely difficult to determine, and there was considerable difference of opinion upon it. Ultimately, however, the House of Lords, agreeing with L. J. Turner, and disagreeing with L. J. Knight Bruce, and V.-C. Wood, decided that the lease had become part of the property of the firm.

*In re Streatfield, Lawrence & Company* (d), two partners bought

(b) 4 DeG. & Sm. 351. See, also, 7 ib. 833.

*Pilling v. Pilling*, 3 DeG. J. & S. 162.

(c) 5 Jur. N. S. 809, and on appeal, & J. 645.

(d) Bank of England case, 3 DeG. F.

an estate with partnership money. The land was conveyed to them in undivided moieties to uses to bar dower, and each partner built a house on the land with money of the firm, but charged to him in his private account. An account was opened in the partnership books, and in this account the purchased estate was debited with all moneys of the partnership expended in the purchase. At the time of the purchase the land was in lease, but the tenant surrendered to the partners those portions which they wanted, they reducing his rent. The rents, viz., both that paid by the tenant for what he held, and that paid to him for what he gave up, were treated in the books of the firm as paid to and by it. There was evidence to show that the partners intended to come to some arrangement respecting the division of the estate, but they became bankrupt before  
 \*651 doing so. It was held that both the land and the houses on it were the joint property of the firm, and not the separate properties of the partners.

In *Collins v. Jackson* (e), two persons were in partnership as solicitors, and one of them held several appointments frequently held by a gentleman of that profession; he was clerk to poor law guardians, superintendant registrar of births, marriages, and deaths, treasurer of a turnpike trust, steward of a manor, treasurer of a charity, and receiver of tithes. The question arose whether the profits of these offices belonged to the partnership or not. There was no written agreement specifically applying to these offices, but there was a memorandum relating to some others reserved by the father of one of the partners when he retired from business, and the Master of the Rolls held that all the offices in question were to be treated as held on behalf of both partners, and not for the exclusive benefit of the partner who actually filled the offices. (f)<sup>1</sup>

(e) 31 Beav. 645.

(f) See, also, *Smith v. Mules*, 9 Ha. 556; and *Ambler v. Bolton*, 14 Eq. 427, as to the mode of dealing with such offices on a dissolution.

<sup>1</sup>One of two partners entered into an agreement with a neighboring postmaster, by which the office was to be kept at the store of the firm, and the contracting partner was appointed deputy; but the business was transacted by the clerks of the store indiscriminately, no

separate books were kept, the money went into the partnership funds, and all payments on account of the post-office were made out of the funds of the firm: *Held*, that the profits of the post office belonged to the firm, especially as the partners had made two settlements between themselves, without any separate claim to those profits having been set up by the partner who contracted for the business. *Caldwell v. Leiber*, 7 Paige, 483.

The cases, however, which present most difficulty, are those in which co-owners are partners in the profits derived from their common property. (*g*) Suppose, for example, that two or more joint tenants, or tenants in common, of a farm or a mine, work their common property together as partners, contributing to the expenses and sharing all profits and losses equally, there will certainly be a partnership; and yet, unless there is something more in the case, it seems that the land will not be partnership property, but will belong to the partners as co-owners, just as if they were not partners at all (*h*): and the result may even be the same if they purchase out of their profits other lands for the purpose of more conveniently developing their business. (*i*)

In *Morris v. Barrett* (*k*) lands were devised to two persons as \*joint tenants. They farmed \*652 those lands together for twenty years, and kept their money in one common stock to which each had access, but they never came to any account with each other. Out of their common stock they bought other lands, which were conveyed to one of them only, but were farmed by both, like the first lands. It was held that the devised farms were not partnership property, but that the purchased farms were.<sup>1</sup>

Cases where co-owners share profits.

Land acquired by devise farmed in common.

*Morris v. Barrett.*

(*g*) As to the distinction between co-ownership and partnership, see *ante*, p. 58 *et seq.*

(*h*) See *Crawshay v. Maule*, 1 Swanst. 523; and *Roberts v. Eberhardt*. Kay, 159. See, also, *Williams v. Williams*, 2 Ch. 294, where the partnership had expired, but an agreement to divide the property was held to have been come to.

(*i*) *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479, a case of a farm and quarry. But compare *Morris v. Barrett*, *Phillips v. Phillips*, and *Waterer v. Waterer*, cited below.

(*k*) 3 Y. & J. 384. Compare *Waterer v. Waterer*, *infra*, p. 653.

<sup>1</sup> Whether real estate shall be considered as partnership property depends largely upon the intention of the partners; see *Ludlow v. Cooper*, 4 Ohio St. 1; *Smith v. Jackson*, 2 Edw. 28; *Wheatly v. Calhoun*, 12 Leigh, 264.

Where real estate is conveyed to a firm or to the co-partners, in their individual names, for the use and benefit of the firm, or in payment of debts due to the firm, in the absence of any agreement or understanding to the contrary, the grantees become at law tenants in common of the land; and upon the death of either, the legal title to his undivided share descends to his heirs-at-law. *Buchan v. Sumner*, 2 Barb. Ch. 165; *Caldwell v. Palmer*, 56 Ala. 405; *Wood v. Montgomery*, 60 Ala. 500; *Anderson v. Tompkins*, 1 Brock. 456; *Wiley v. Carter*, 4 La. Ann. 56; *Arnold v. Stevenson*, 2 Nev. 234; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. 103; *Ensign v. Briggs*, 6 Gray, 329; *Galbraith v. Gedge*, 16 B. Mon. 631; *Devine v. Mitchum*, 4 id. 488; *Coles v. Coles*, 15 John. 159. See, also, *Thompson v. Bowman*, 6 Wall. 316; *Blake v. Nutler*, 19 Me. 16. See *post*, 664, note.

In *Brown v. Oakshot* (Z) a brewer devised his real estates to joint tenants for a term of 500 years, upon trust, to pay certain annuities, and to divide the surplus rents between his sons, and he devised the same estates subject to this term to his sons as joint tenants. The sons carried on

Joint tenants  
by devise  
partners in  
profits.

*Brown v.*  
*Oakshot.*

So, where land is purchased by partners with partnership funds, but not for the use and convenience of the partnership business, or in the legitimate line of their partnership business, they become invested with the title as tenants in common, and their respective interests therein are several. *Price v. Hicks*, 14 Fla. 565; *Russell v. Miller*, 26 Mich. 1.

But where land is purchased with partnership funds and conveyed to the partners by name, although in law they are considered as tenants in common, and no notice is taken of the equitable relations arising out of the partnership, yet in the absence of an express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, in equity the partnership property will be devoted to partnership purposes, and a trust is created for the security of the partnership debts. If the partnership becomes insolvent, the property is primarily liable to the payment of the partnership debts, to the postponement of the creditors of the several partners. *Ross v. Henderson*, 77 N. C. 170; *Robertson v. Baker*, 11 Fla. 192. See, also, *infra*, in this note.

But where a deed of lands was made to A, B and C, "doing business as A, B & Co., their heirs and assigns," it was held that the grantees took the legal estate in joint tenancy, and a judgment confessed by all of them in their individual names with the same words, "doing business, etc.," added thereto, is a lien upon the land, and will bind it in the hands of subsequent purchasers from the firm. *Lauffer v. Ca-*

*vett*, 87 Pa. St. 479.

The appearance of real estate on partnership books to the extent necessary to carry on the business of the firm, is not inconsistent with the partners' title to the real estate as tenants in common. *Grobb's Appeal*, 66 Pa. St. 117.

Although the proposition that when a partnership ceases the partners become tenants in common of the partnership property then undisposed of, is generally true, yet it is not universally true. So long as partnership debts remain unpaid, partnership property continues such, for the purpose of being applied to the payment of such debts. *Rice v. McMartin*, 39 Conn. 573.

Partners may by contract stipulate that the ownership of property may remain in one, while the firm shall have only the use of the same, as between themselves, or any other regulation in regard to ownership of the property used, not prohibited by law. *Taft v. Schwamb*, 80 Ill. 289.

While there may be partnerships in the business of milling, mining or farming, unless the intent of the joint owners to throw their real estate into the fund as partnership stock is distinctly manifested, or unless the real property is bought out of the social funds for partnership purposes, it must still retain its character of realty. *Wheatly v. Calhoun*, 12 Leigh, 264.

Where land purchased with partnership funds is conveyed to the partners by a deed which would ordinarily make them tenants in common thereof, it will be deemed in equity converted into personal property, and may be adminis-

(I) 24 Beav. 254.

their father's business in partnership together, and used the real estate devised to them for the purposes of the business; but it was

tered upon as such, in winding up the affairs of the concern, unless from the books, or other sources, it appears that business profits were thus invested to pay a dividend to the partners. The intention of the partners in making the purchase, as shown by the evidence in the case, should govern the construction of the conveyance. *Collumb v. Read*, 24 N. Y. 505.

A mere agreement to use real property for partnership purposes, or as partnership property, is not sufficient to convert it into partnership stock, in the absence of any evidence of such intention. The mere fact that property held by the firm as tenants in common, is used in and for the partnership business, or a mere agreement to use it for partnership purposes, is not of itself sufficient to convert it into partnership stock. There must be some evidence of further agreement to make it partnership property. *Alexander v. Kimbro*, 49 Miss. 529; *Thenot v. Michel* 28 La. Ann. 107. See, however, *Osborn v. McBride*, 16 Bank. Reg. 22, as to the presumption upon the question.

Thus, the mere fact that partners carry on partnership business on a lot of land belonging to the members of the partnership, does not necessarily impress it with the character of partnership property, unless they have by agreement, or otherwise, purposely impressed upon it that character. *Ware v. Owens*, 42 Ala. 212; *Pecot v. Arnelin*, 21 La. Ann. 667.

An oral agreement of two persons to sell lands of each, and employ the proceeds as capital for going into business as partners is valid; and a ferry and franchise purchased by one, with the proceeds, is partnership property. *Knott v. Knott*, 6 Ore. 142.

Real estate acquired with partnership funds, for partnership purposes, must be

considered as partnership property, and liable to all the incidents attending that description of property. *Sigourney v. Munn*, 7 Conn. 11; *Matlock v. Matlock*, 5 Ind. 403; *Abbott's Appeal*, 50 Penn. St. 234; *Hoxie v. Carr*, 1 Sumn. 173; *Pugh v. Carrie*, 5 Ala. 446; *Lancaster Bank v. Myley*, 13 Penn. St. 544; *Brooke v. Washington*, 8 Gratt. 248. See, however, *Smith v. Jackson*, 2 Edw. 28.

A partnership "for the purchase of lands" does not, however, necessarily contemplate sales of land so as to make the land stock in trade, but it passes to the heir as real estate, and not to the administrator. *Dilworth v. Mayfield*, 36 Miss. 40.

Two persons took a lease of a coal mine as tenants in common. Afterwards they associated themselves in the business of coal mining, shipping and selling, as partners, the business to be carried on from the proceeds of the demised premises, for the whole period of the lease: *Held*, that the leasehold became partnership property. *Patterson v. Silliman*, 23 Pa. St. 304. See, also, *Morton v. Ostrom*, 33 Barb. 256.

Where partners purchased a leasehold estate with partnership property, gave a deed of trust upon it, and the trustee, after the death of one of the partners, sold the estate under the power in the deed, a surplus remaining: *Held*, that the surplus was to be considered as partnership property, upon which the surviving partner was entitled to administer. *Carlisle v. Mulhern*, 19 Mo. 56.

Real property, an undivided half interest which was bought and paid for by each of two partners, who with partnership funds completed, repaired, improved and protected it, and who used it for partnership purposes, becomes thereby partnership property. *Roberts v. McCarty*, 9 Ind. 16.

nevertheless held that the reversion in fee continued to be vested in them jointly, and not in common, as would have been the case had it become partnership property.

Two persons who were partners in the business of fishing and selling fish, bargained for a block of land, gave their note to the defendant for the price, and took the defendant's bond for a deed in payment of the note, and paid one year's interest before the note fell due. One of the partners having died, the other, claiming to act as surviving partner, assigned the bond and the land to the plaintiff two years after the note fell due, no administration being had, and it being a disputed question whether the land was purchased for partnership purposes. In a suit by the assignee for specific performance: *Held*, that the question of fact, whether the land was purchased for partnership purposes, could not be ultimately settled so as to bind the heirs of the deceased partner, in a suit where neither the heirs nor the representatives of the deceased partner were made parties; and that the defendant should not be required to convey to the assignee of the survivor unless he has reasonable grounds of certainty on that question. *Knott v. Stevens*, 3 Oreg. 269.

Real estate purchased for, and appropriated to or intended to be used for partnership purposes, and paid for out of partnership funds, is partnership property, although the legal title is taken in the individual names of the partners, or in the name of one of the partners, or in the name of a third person, equity will hold the party holding the legal title, or his heirs in case of his death, as trustee for the firm. *Fairchild v. Fairchild*, 64 N. Y. 471; *S. C.* 5 Hun, 407; *Faulds v. Yates*, 57 Ill. 416; *Little v. Snedcor*, 52 Ala. 167; *Hewitt Rankin*, 41 Iowa, 35; *Smith v. Tarleton*, 2 Barb. Ch. 336; *Drewry v. Montgomery*, 28 Ark. 256; *Johnson v. Clark*,

18 Kan. 157; *Hogle v. Lowe*, 12 Nev. 286; *Boyers v. Elliott*, 7 Humph. 204; *McGuire v. Ramsey*, 9 Ark. 518; *Indiana, etc. Co. v. Bates*, 14 Ind. 8; *Fowler v. Bailley*, 14 Wis. 125; *Owens v. Collins*, 23 Ala. 837; *Lacy v. Hall*, 37 Penn. St. 360; *Erwin's Appeal*, 39 id. 535; *Jarvis v. Brooks*, 27 N. H. 37; *Cilley v. Huse*, 40 id. 358; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Dupuy v. Leavenworth*, 17 Cal. 262; *Price v. Hicks*, 14 Fla. 565; *Uhler v. Semple*, 20 N. J. Eq. 288; *Abbott's Appeal*, 50 Penn. St. 234; *Fowler v. Bailley*, 14 Wis. 125; *Lime Rock Bank v. Phetteplace*, 8 R. I. 56; *Lancaster Bank v. Myerley*, 13 Penn. St. 544; *Hiscock v. Phelps*, 49 N. Y. 97; *King v. Weeks*, 70 N. C. 372; *Owens v. Collins*, 23 Ala. 837; *Dewey v. Dewey*, 35 Vt. 555; *Chamberlain v. Chamberlain*, 44 N. Y. Sup'r Ct. 116; *Matlack v. James*, 13 N. J. Eq. 126; *Smith v. Tarleton*, 2 Barb. Ch. 336; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Cox v. McBurney*, 2 Sandf. 561; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Whitney v. Cotton*, 53 Miss. 689; *Buffum v. Buffum*, 49 Me. 108. See, also, *Rommelsburg v. Mitchell*, 29 Ohio St. 22; *Holmes v. Moon*, *infra*; *Deming v. Colt*, 3 Sandf. 284; *Bird v. Morrison*, 12 Wis. 138; *Devenney v. Mahoney*, 23 N. J. Eq. 247; *McGuire v. Ramsey*, 9 Ark. 518.

C. bargained for a grist-mill and appurtenances, paid \$1,000 down, and took a bond for a deed; made a verbal contract to sell it to D. and received \$1,300 of him in part payment; D. took the possession, laid out a considerable sum in repairs and improvements, and carried on the business a short time, when he and C. made a verbal contract of co-partnership in the grist-mill business and carried it on together at this grist-

In *Phillips v. Phillips* (m) public-houses were devised to two persons who carried on a brewery in partnership, and it was held that such houses did not become partnership property, though used for the purposes of the partnership. In the same case some mortgage debts secured

Public-houses devised to partners in a brewery.

*Phillips v. Phillips.*

mill for two years, neither of the parties claiming rent; the grist-mill was taxed to the company, and one year's taxes were paid out of the company's funds, and payments were made on C.'s notes named in the bond for a deed which he held, by giving credit to the parties to whom payments were made on the company's books. A dam tax of \$75 was paid in the same manner. At the end of the two years, C. gave D. notice that he was going to dissolve the co-partnership; D. proposed that it should be mutual, and that they should bid for choice of the mill property. C. does not deny that he told D. that he would shortly say what he would give or take, but he did not do this; yet a few days afterwards he took a deed of the mill property to himself, discharged the bond, excluded his co-partner, mortgaged the mill property to secure some partnership debts, and some of his own, and the balance of the purchase money remaining due, and brought this bill in equity to close the partnership affairs.

The bill and answer both admit the existence of the partnership. It is satisfactorily proved that the verbal contract for the sale of the mill from C. to D. was abandoned by mutual consent when they went into partnership, and that the understanding between them was that the purchase of the mill property should be completed on partnership account, the sums previously paid and expended by

the partners severally toward the purchase or in the improvement of the mill property, to be regarded as so much contributed by them respectively to the partnership funds: *Held*, that there is nothing in the statute of frauds to prevent partnership equities from attaching to the grist-mill property, and that it should stand charged, as between these parties, for the payment of partnership debts, and any balance that may be found due to either of the partners upon the final adjustment of the partnership accounts; the legal title not to be disturbed except as may be necessary for these purposes. *Collins v. Decker*, 70 Me. 23.

Where real and personal property is held in trust by one partner for the benefit of the firm, and upon an agreement that he will not dispose of it without the consent of the others, he cannot be compelled to convey to one of the other partners his share in the property, until, such partner shall have first paid to him his share of indebtedness for advances made. *Cheeseman v. Sturges*, 6 Bosw. 520.

Where partners own each in severalty the real estate where the business is carried on, and buildings have been erected and improvements made thereon by the firm, the lands, on a dissolution will be treated as partnership assets. *Smith v. Danvers*, 5 Sandf. 669.

Where B. owning a saw-mill proper-

(m) As stated in *Bisset on Partnership*, p. 50. The report in 1 M. & K. 649, is silent as to the property devised. Mr. Bisset considers the decision as an authority on the point of conversion. But if, as he represents, the Court came

to the conclusion that the devised property was not in fact partnership property, the question of conversion would not arise. Compare *Waterer v. Waterer*, 15 Eq. 402 *infra*.

on public-houses were bequeathed to the two partners, and they af-

ty, formed a partnership with F. in the lumber business, agreeing by parol that the mill estate should constitute part of the partnership fund. and F. paid a part of the consideration in cash, the rest to be paid out of the profits of the business: *Held*, that the title of B. did not pass to the firm, although F. went into possession with B. and improvements were made upon the property out of the firm funds. McCormick's appeal, 57 Pa. St. 54.

M. and C. entered into partnership, M. contributing real estate at an estimated value, which was carried into the firm stock account to his credit, he reserving the right on dissolution not to be bound by the estimated value and to withdraw the property. During the partnership the buildings were burned and rebuilt by the firm funds: *Held*, that the real estate was, in equity, partnership property with the legal title in M.; that his reservation was a provision to correct the valuation; that M. withdrawing it on dissolution, would take it at its then value; and that the property with its accretions belonged to the firm, to be accounted for as firm assets. Clark's appeal, 72 Pa. St. 142.

Where one of a firm of four brothers purchased, in his own name, a lot, and leased it to the firm, and the firm erected its oil refinery thereon: *Held*, that his three brothers could not in an equity proceeding, afterwards claim that the lot should be treated as firm property, although he had acted in bad faith in procuring the conveyance to himself rather than to the firm,—his act having been long acquiesced in by the three others without an investigation of the false and flimsy reason he had assigned therefor. Slemmer's appeal, 58 Pa. St. 168.

There is, however, no presumption that a leasehold standing in the name of one of several co-partners, and used

by the firm for their business, constitutes partnership assets. The presumption is otherwise; its mere use for partnership purposes does not operate to divest or affect the legal title. *Chamberlain v. Chamberlain*, 44 N. Y. Supr. Ct. (12 Jones & sp.) 116.

Where, however, all the members of a partnership join in a deed of land, the presumption is, in the absence of proof, that the consideration money goes to the use of the firm. *Lincoln v. White*, 30 Me. 291.

A partnership, as such, cannot hold the legal title to real estate. But where a deed was made to Jarrett, Moon & Co., it not appearing whether the firm was composed of Jarrett & Moon and others, or Jarrett Moon (one person) and others: *Held*, that in the former case the legal title vested in Jarrett and Moon, and in the latter in Jarrett Moon, in trust, for the partnership; the uncertainty arising from the omission of the Christian names of grantees might be removed by parol proof. *Holmes v. Moon*, 7 Heisk. 506. See, also, *Tidd v. Rives*, 2 N. W. Rep. (N. S.) 497.

A conveyance of real estate to "J. L. S. & Co." vests the legal title in J. L. S. individually, clothed, however, with a trust for the benefit of the partnership. *Moreau v. Saffarans*, 3 Sneed, 595.

Where one partner invested a portion of the partnership funds in lands for his own use, it was held that this created a resulting trust, and that the other partners might follow it and claim their portion of the specific property. *King v. Hamilton*, 16 Ill. 190. See, also, *Edgar v. Donnally*, 2 Munf. 387.

If one partner purchase land to his own use with money taken out of the joint fund, the lands have been held not to be joint stock. *Goodwin v. Richardson*, 11 Mass. 469; *Pitts v. Waugh*, 4 id. 424.

terwards purchased the equities of redemption, and paid for them

In Louisiana real estate owned by commercial partners does not enter into their commercial assets. As regards that species of property they are joint owners. *Guilbeau v. Melancon*, 28 La. Ann. 627.

Under the laws of Louisiana prohibiting a commercial partnership from owning immovable property, if immovable property is purchased with partnership funds by one of the partners in his own name, and without the consent of his co-partners, the property itself belongs to the partner purchasing, but its value at the time of the purchase belongs to the partnership. No decree of a court could be rendered to vest the title of property so purchased in the partnership, for the partnership is incapable of acquiring title. *McKee v. Griffin*, 23 La. Ann. 417.

Where the title to land belonging to a partnership is vested in one of the partners, the fact that it is partnership property may be established by parol. *Zook v. Clemens*, 41 Iowa, 95; *Sherwood v. St. Paul, &c. R. R. Co.* 21 Minn. 127; *Bird v. Morrison*, 12 Wis. 138; *Fairchild v. Fairchild*, 64 N. Y. 471; *In re Farmer*, 18 Bank Reg. 207; *Block v. Seipt*, 17 Weekly Notes of Cases, 565. *Thompson v. Egbert*, 3 Thomp. & C. 474; S. C. 1 Hun, 484. See, also, *Little v. Snedcor*, 52 Ala. 167; *Hewitt v. Rankin*, 41 Iowa, 35; *Drewrey v. Montgomery*, 28 Ark. 256; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Hauff v. Howard*, 3 Jones' Eq. 440; *Collins v. Decker*, 70 Me. 23.

As to strangers, however, it is held in Pennsylvania that partners' agreements to make real estate common stock must be in writing, and ought to be on record. It is not competent to show by parol that real estate conveyed to two as tenants in common, is partnership property. *Lefevre's appeal*, 69 Pa. St. 122. See, also, *Ebbert's appeal*, 70 Pa. St.

79; *Jones' appeal*, id. 169; and *Hale v. Henric*, 2 Watts, 143; *Ridgway's appeal*, 15 Penn. St. 177; *Otis v. Sill*, 8 Barb. 102.

Where there is a conveyance to one partner by a deed absolute on its face, and it is attempted to be shown by parol that it was in fact a conveyance to him for the use of himself and his co-partner as tenants in common, it is competent to rebut this evidence by showing by parol evidence that it was owned by them as partnership property. *Black's appeal*, 89 Pa. St. 201.

Improvements upon land owned by one partner, or by several partners as tenants in common, made with partnership funds, are partnership property. *Lane v. Tyler*, 49 Me. 252; *Kendall v. Rider*, 35 Barb. 100; *Hiscock v. Phelps*, 44 N. Y. 97. See, also, *Deveney v. Mahoney*, 23 N. J. Eq. 247.

Where real estate is purchased by one of two partners, and paid for out of his individual funds, and improvements are made thereon with the partnership funds, between the time of the giving of a judgment by one of the partners as a security for future responsibilities, and the incurring of such responsibilities by the judgment creditor, the equitable interest of the other co-partner to be reimbursed his share of the partnership funds applied to the making of such improvements is prior, in point of time, to the lien of the judgment, upon the principle that an incumbrance which intervenes between a judgment and further advances takes priority over the latter. *Averill v. Loucks*, 6 Barb. 19.

Employing partnership funds in making permanent improvements upon real property owned by the partners, and appropriated to the partnership business, is not necessarily a fraud upon the creditors of the firm, if no intent to defraud is shown. *Parker v. Bowles*, 57 N. H. 491.

out of the funds of the partnership, but it was held that the proper-

Where real estate is owned in undivided interests by the individuals who compose a partnership which has only the use of it, trade fixtures set up by the partners do not become realty, and when their occupation ceases they may remove them. They are not covered by mortgages on the premises, if their owners do not plainly mean them to be so. *Robertson v. Corsett*, 39 Mich. 777.

In equity partnership real estate is treated as mere personalty, and is governed by the rules and general doctrines applicable to that species of property. See *Arnold v. Wainwright*, 6 Minn. 358; *Davis v. Christian*, 15 Gratt. 11; *Mauck v. Mauck*, 54 Ill. 281; *Scruggs v. Blair*, 44 Miss. 406; *Nicoll v. Ogden*, 29 Ill. 323; *Hill v. Beach*, 12 N. J. Eq. 31; *Ludlow v. Cooper*, 4 Ohio St. 1; *Moderwell v. Mullison*, 21 Penn. St. 257; *Day v. Perkins*, 2 Sandf. Ch. 359 (a leasehold); *Andrews v. Brown*, 21 Ala. 437; *Black v. Black*, 15 Geo. 445; *Whitney v. Cotton*, 53 Miss. 689; *Galbraith v. Gedge*, 16 B. Mon. 631; *Divine v. Mitthum*, 4 id. 488; *Coles v. Coles*, 15 Johns. 159; *Piatt v. Oliver*, 3 McLean, 27. See, also, *Morgan v. Olney*, 53 Ind. 6; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Foster v. Barnes*, 81 Penn. St. 377; *West v. Hickory Mining Ass'n*, 80 id. 38. See, however, *Ferguson v. Hass*, Phill. Eq. 113.

But this rule grows out of the peculiar nature of the partnership relation, and is adopted for the purpose of doing justice between partners, or between them and others having dealings with them, and for the purpose of properly adjusting the relations between them, or between them and others having dealings with or relations to the partnership. It is not an arbitrary rule, by which a court of equity transmutes real estate into personal property when it is once owned and possessed by a partnership,

and causes it to take that character outside of and independent of the exigencies of the partnership. *Black v. Black*, 15 Ga. 445.

Although a court of equity considers and treats real property, purchased with the partnership funds, and held for the purposes of the firm, as constituting part of the stock of the partnership, it leaves the legal title undisturbed, except so far as may be necessary to protect the equitable rights of the respective partners. *Lang v. Waring*, 25 Ala. 625.

The real estate of a partnership is held as personalty for the purposes of the partnership, but where not needed for such purposes it descends as other real estate to the heir. *Williamson v. Fontain*, 7 J. Baxt. (Tenn.) 212. See, also, *McGrath v. Sinclair*, 55 Miss. 89; *Yeatman v. Woods*, 6 Yerg. 20; *Gaines v. Catron*, 1 Humph. 514; *Piper v. Smith*, 1 Head, 93; *Summey v. Patton*, 1 Wins. (N. C.) Eq. (No. II.) 52. See, however, *McAllister v. Montgomery*, 3 Hayw. (Tenn.) 94.

The widow of a deceased partner cannot, therefore, treat the partnership real estate as personal property, but it goes to the heir. *Williamson v. Fontain*, *supra*.

Where the legal title to lands purchased and held for partnership uses is in the partners individually, they are nevertheless subject to an implied trust that they shall be applied to the payment of the partnership debts; and the widow of a deceased partner is not entitled to dower therein until the trust is fully executed. *Bopp v. Fox*, 63 Ill. 540; *Price v. Hicks*, 14 Fla. 565; *Uhler v. Semple*, 20 N. J. Eq. 288; *Campbell v. Campbell*, 30 id. 415; *Howard v. Priest*, 5 Metc. 582; *Simpson v. Leech*, 86 Ill. 236; *Stroud v. Stroud*, Phill. L. 525; *Robertshaw v. Hanway*, 52 Mass. 713. See, also, *Hudson v. Neil*, 41 Ind.

ty thus acquired did not form part of the partnership property, the

505; *Cook v. Watson*, 30 N. J. Eq. 345.

The right to a homestead exemption stands on no higher ground. *Robertshaw v. Hanway*, *supra*; *Terry v. Berry*, 13 Nev. 514; *Commercial & S. Bank v. Corbett*, 5 Sawy. 543.

Partnership real estate can, moreover, only be conveyed as real estate by those holding the legal title. *Davis v. Christian*, 15 Gratt. 11.

Neither partner can alone convey more than his undivided interest therein. *Anderson v. Tompkins*, 1 Brock. 456; *Willey v. Carter*, 4 La. Ann. 56; *Arnold v. Stevenson*, 2 Nev. 234; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. 103. See, also, *Weld v. Peters*, 1 La. Ann. 432.

A mortgage executed by an individual member of a firm, upon land the legal title to which is vested in him, but which is in fact owned and used by the firm as partnership property, is "real estate security" within the clause in a will directing such security to be taken for money loaned. *Miller v. Procter*, 20 Ohio St. 442.

However, land purchased by several for the purpose of sale for profits only, and not for permanent use, will be regarded in equity as personal property among the partners in the speculation, and one of them, it is held, may release his interest in the same orally. *Morrill v. Colehour*, 82 Ill. 618.

And where land is partnership stock, it never becomes personalty, even during the continuance of the firm, so as to give one partner power to dispose of the firm interest in it. *Foster's appeal*, 74 Pa. St. 391.

Real property purchased with partnership funds for partnership purposes, and which remains after paying the debts of the firm, and adjusting the equitable claims of the different members of the firm, as between themselves, is considered and treated as real estate.

*Buckley v. Buckley*, 11 Barb. 43; *Scruggs v. Blair*, 44 Miss. 456. See, however, *Thayer v. Lane*, Walk. Ch. 200.

And in the settlement of the estate of a deceased co-partner, any real estate of the partnership remaining after the fulfillment of all partnership obligations, is to be treated as realty. *Wilcox v. Wilcox*, 13 Allen, 252.

Real estate owned and used by a partnership may be deemed personalty, not only for purposes of the partnership but for distribution also, when the intention of the partners that it should be so treated appears. In the absence of their agreement, express or implied to this effect, it should only be so regarded for the purposes of the partnership, and after these are answered, the surplus should be held to be real estate for all other purposes. *Lowe v. Lowe*, 13 Bush, 688. See also *Scroggs v. Blair*, 44 Miss. 406. Compare *Bank of Louisville v. Hale*, 8 Bush, 672; *Cornwall v. Cornwall*, 6 id. 369.

When land, held as personalty stock, and therefore deemed personalty, is sold by the firm, the land becomes land again, in the hands of the purchaser, and the proceeds personalty, but only to the extent of accomplishing the purposes of the conversion, namely, the equity of the partners to have the joint debts and their own advances paid before any part goes to the other partners or their separate creditors. The time of re-conversion is the moment the partnership is wound up, either by decree, judgment or agreement, and it is determined to be no longer partnership stock nor required for its purposes. *Foster's appeal* 74 Pa. St. 391.

In a court of equity, real estate belonging to a firm, purchased with the partnership funds and treated as partnership property, is considered as personal property to this extent at least,

equities of redemption following the mortgage debts. But in this

that it is liable to pay the debts of the firm, and the surviving partner has a claim on it for that purpose, which is superior to the title of the widow and heirs-at-law of the deceased partner. *Andrews v. Brown*, 21 Ala. 437.

A surviving partner is entitled to use the real estate of the partnership as firm assets so far as it is needed to settle the affairs of the firm, and decedent's heirs hold the legal estate only as trustees for the equitable purposes of the firm. *Merritt v. Dickey*, 38 Mich. 41; *Dupuy v. Leavenworth*, 17 Cal. 262. See, also, *Mathews v. Hunter*, 67 Mo. 293.

As to what circumstances will justify the exercise of the power of a court of equity to authorize a surviving partner to sell at private sale realty owned by an insolvent firm, see *Mauck v. Mauck*, 54 Ill. 281.

Where real estate is purchased with partnership funds, the title taken in the partnership name, and the property held for partnership purposes, and on the death of one of the partners, the firm being insolvent, the surviving partner conveys the lands, with all the other partnership property, to an assignee, in compromise and settlement of the claims of creditors, who assent to it, the assignee may maintain a bill in equity against the heirs of the deceased partner, to compel a divestiture of the legal title, and have the lands applied to the payment of the partnership debts. *Murphy v. Abrams*, 50 Ala. 293.

An administrator cannot be held liable for not receiving and accounting for funds arising from the sale of his intestate's partnership interest in real estate, when the whole property was needed to satisfy the debts of the firm, and the sale was made to the surviving partner in order to transfer to him the legal title, to be used in settling the business. *Merritt v. Dickey*, 38 Mich. 41.

If rents and profits accrue from the real partnership assets while in the hands of a surviving member of a firm, such rents and profits are personal property, and any surplus would go to the personal representative of the deceased partner. The heir would only be entitled to the realty or its surplus, if sold, as it stood at the death of his ancestor. *Griffey v. Northcutt*, 5 Heisk. 746.

Where land is held by a firm by deed expressing that it is partnership stock, an incumbrance against a member of the firm is not a lien upon any interest in it, so as to prevent the firm conveying to a purchaser clear of the incumbrance. *Meily v. Wood*, 71 Pa. St. 488.

In such case, the land is personal property to be applied according to the equities between the partners, in payment of the partnership debts in the first instance; so that an execution by a separate creditor would sell, not an interest in realty, but the balance due his debtor, with right by bill in equity to compel a settlement. *Meily v. Wood*, *supra*.

Partnership real estate must be first applied to the satisfaction of the partnership debts. *Matlock v. Matlock*, 5 Ind. 403; *Winslow v. Chiffelle*, 1 Harp. Ch. 25; *Hunter v. Martin*, 2 Rich. 541; *Overholt's Appeal*, 12 Penn. St. 222; *Marvin v. Trumbull*, Wright, 386; *Bryant v. Hunter*, 6 Bush, 75; *Cornwall v. Cornwall*, id. 369; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13; *Uhler v. Semple*, id. 288.

The rule is the same though the title stands in an individual partner or in several partners as tenants in common. *Lime Rock Bank v. Phetteplace*, 8 R. I. 56; *Watlock v. James*, 13 N. J. Eq. 126; *Jarvis v. Brooks*, 27 N. H. 37; *Cilley v. Huse*, 40 id. 358; *Gordon v. Kennedy*, 36 Iowa, 167; *Fall River Whaling Co. v. Borden*, 10 Cush. 458.

The rule is the same in the case of

very case it was held that other public-houses purchased by the

improvements upon such realty. *Hiscock v. Phelps*, 49 N. Y. 97. See, also, *Deveney v. Mahoney*, 23 N. J. Eq. 247.

A partnership at its dissolution was much in debt, and the estate of a deceased partner was insolvent: *Held*, that the fact that a piece of land which was owned in common by the partners was presumptively a part of the firm assets, was sufficient ground to grant an injunction in favor of the surviving partner, forbidding the administrator of the deceased partner from proceeding to sell such land to pay the separate debts of his intestate, under a license from the county court. *Williams v. Moore*, Phill. Eq. 211.

A, B and C were partners in the lumber business. A deed granting them a quarter section of land recited that an undivided half was granted to A, an undivided quarter to B, and an undivided quarter to C, adding, "this being the proportional undivided interest of each of the above partners in the lumber firm and land of Milo A. Skinner & Co." A mortgaged his interest to secure money loaned him personally: *Held*, that such recital in the deed was not notice to the mortgagee that such land was, in fact, partnership property, and primarily liable for partnership debts. *Van Slyck v. Skinner*, 1 N. W. Rep. N. S. 971.

A and B were tenants in common of a saw-mill with the land and appurtenances conveyed to them by separate deeds, each owning an undivided half, and each furnishing the purchase-money for the share conveyed to him. They subsequently formed a co-partnership, and entered into a parol agreement to consider the real estate partnership property, using it in their partnership business: *Held*, that it was not liable in equity to the payment of the partnership debts, as against the separate creditors of the co-partners, who had given

credit and taken security thereon from them upon the strength of their owning the property as tenants in common. *Parker v. Bowles*, 57 N. H. 491.

Upon the sale of real estate of one of two partners, and the appropriation of the proceeds to the payment of a judgment against both, a subsequent judgment creditor of that partner whose separate estate was sold, is not entitled to be substituted as plaintiff in the judgment to which the money was appropriated, so as to enable him to proceed against the other partner unless it shall be made to appear that he whose separate property was sold was, at the time, a creditor partner of the firm: *Sterling v. Brightbill*, 5 Watts, 229.

No partner or proportion of partners can sell or transfer the real estate of the firm outright for money, or by way of mortgage, as to assignees in trust for debts, without the consent and authority of the other partners. A conveyance made by one partner, purporting to convey lands belonging to the firm, passes only the grantor's undivided interest. *Goddard v. Renner*, 57 Ind. 532. See, also, *Jackson v. Stanford*, 19 Ga. 14; *Layton v. Hastings*, 2 Harr. 147; *Jones v. Neale*, 2 Patt. & H. 339.

It has been held, however, that if one partner make an assignment of the real estate belonging to the firm, the legal title will be held by the firm in trust for the assignee. *Baldwin v. Richardson*, 33 Tex. 16.

A surviving partner cannot alone convey real estate belonging to the firm. *Galbraith v. Gedge*, 16 B. Mon. 631.

Where the surviving partner of a firm which had been engaged in gambling, and had purchased and used a house for gambling purposes, sought to impeach the title by which a grantee of his partner held it, on the ground that it was used for unlawful purposes he was held to be estopped by his privity to the

partners out of the partnership funds, and used for the purposes of

grantor. *Watson v. Fletcher*, 7 Gratt. 1.

Two partners holding unequal interests, having foreclosed a mortgage upon real estate taken to indemnify the partnership against a certain securityship, bid in the property, and the land was conveyed to them jointly, without designating their respective interests: *Held*, that each took a moiety of the legal title, but that in equity they would hold according to their respective interests; and that a conveyance by the executor of the partner holding the greater interest "of all the right, title, and interest which the testator had at the time of his decease," would pass to the grantee the legal title to one-half the land, and the equitable title to the additional interest held by the testator; and that one holding under this grantee, without notice of the non-payment of the purchase-money of the equitable interest, would hold it discharged of the vendor's lien. *Putnam v. Dobbins*, 38 Ill. 394.

A *bonâ fide* purchaser of real estate from a member of a co-partnership, for a valuable consideration and without notice of the partnership character of the property, purchasing only to the extent of the grantor's legal title, will take the title freed from the equitable claims of others, partners or creditors of the firm. *Dupuy v. Leavenworth*, 17 Cal. 262.

When, however, the legal title to real estate belonging to a partnership is vested in one of its members, the lien acquired by a judgment against him individually, in favor of a creditor of the company, is subject to the equities already existing over the property; and a judgment against the company itself would not operate as an efficient lien on the land. *Coster v. Bank of Georgia*, 24 Ala. 37.

Where S., one of two partners, executed a release deed of land to himself,

and M., the other partner, for a nominal consideration, "received of S. and M., merchants in trade under the firm of S. & Co." "to be held by them in such proportions as is agreed on between them;" it was held that the record of this deed, the singularities of which were calculated to awaken attention, conveyed constructive notice to an incumbrancer under M., that the land was partnership property. *Sigourney v. Munn*, 7 Conn. 324.

Where one partner holds the legal title to the undivided half of certain real estate the whole of which is, in equity, partnership property, the conveyance by him of his undivided half to a creditor of the firm, in payment of a partnership debt, vests in the grantee a good title thereto, notwithstanding the firm is insolvent, and the other partner is ignorant of the conveyance. *Van Bront v. Applegate*, 44 N. Y. 544.

So, a conveyance by one partner, of real estate owned by the partnership, in trust to secure a creditor of the partnership, passes a good title both at law and in equity, to an undivided moiety of such estate; and such creditor is entitled to priority over all other creditors of the firm. But when such property is conveyed by one partner in trust to secure his individual creditors, the property remains subject to the payment of the partnership debts. *Jones v. Neale*, 2 Patt. & H. 339.

A person who loans the entire capital to an individual partner for the purpose of commencing business, acquires an equity equal to that of the creditors of the partnership; and if the money is used in purchasing lands, which are afterwards mortgaged to the lender by the individual partner to secure the loan, the former will acquire an equity superior to that of the creditors of the partnership, but subject to the lien of the other partner, if he purchases with no

its trade, did form partnership property to all intents and purposes. (*n*)

tice of his equitable title to an undivided half. *Reeves v. Ayers*, 33 Ill. 418.

In *Snyder v. Lunsford*, 9 W. Va. 223, however, it was held that a deed of lands owned and used by a partnership, made by one partner only, who, however, was sole owner of the capital stock, to a person from whom he had borrowed the money which he had contributed as capital, was null and void, as against creditors of the firm. *Snyder v. Lunsford*, 9 W. Va. 223.

A conveyance, by one member of a solvent firm, of his undivided interest in the real estate of the partnership, to a stranger, whether made upon a sale, or by way of payment of his individual debt, is valid as against the co-partners; and they cannot maintain an action to have it set aside, on the ground that it was made without their consent, and impairs the credit of the firm. *Treadwell v. Williams*, 9 Bosw. 649.

If creditors do not object, the purchaser takes a good title, and it does not lie with the other members of the firm to object; or, at least, to enable them to do so they must show that the partnership debts exceed the assets, and that there is need of the property in question to provide for the deficiency and equalize the interests of the partners. *Treadwell v. Williams*, *supra*.

If land devoted to the uses of a partnership business is owned by the partners, each holding the legal title to an undivided share, a mortgage, by one, of his interest is valid, and takes precedence over the title of a purchaser at a sale on an execution on behalf of partnership creditors, unless the purchaser can show that the land had, in fact, been made partnership property, and that the mortgagee had notice of this before lending. *Johnson v. Clark*, 18

Kan. 157.

The patent for certain land was issued to S. & R., who composed a firm. S. executed a power of attorney to V. to sell and convey any property belonging to the firm. Within three months thereafter, V., as attorney for S. & R., personally executed a conveyance of the land as partnership property. Forty-five years elapsed without complaint on the part of S., or any one representing him. In an action of ejectment against a third party by one claiming under this conveyance, it was held that the acquiescence of S. in the treatment of the land as partnership property would be presumed. *Wilkerson v. Allen*, 67 Mo. 502.

A lease by one partner of partnership real estate in his own name inures to the benefit of the firm. *Moderwell v. Mullison*, 21 Penn. St. 257.

It is competent, however, for partners to agree among themselves that certain real estate owned by the partnership shall be leased, and that each shall be entitled to his proportion of the rent, shall collect, and may discharge it. A party renting with knowledge of the agreement, contracts with each to pay him his proportion of the rent, and he may sue for it in his own name. And one partner may be a witness for another in such suit. *McDougald v. Banks*, 13 Ga. 451.

If one partner occupy alone a house belonging to the co-partnership, he will be liable to the firm for rent on account of it, although there was no special agreement to that effect, and no charge was made against him on the books of the firm during his lifetime. *Holden v. Peace*, 4 Ired. Eq. 223. See, also, *Stoughton v. Lynch*, 2 John. Ch. 209.

(*n*) 1 M. & K. 649.

Devises of a  
trade and of  
land for the  
purpose of car-  
rying it on.

Jackson v.  
Jackson.

On the other hand, in *Jackson v. Jackson* (o),  
\*653 a testator had \*devised to his two sons jointly,  
his trading business and lands used by him for  
the purpose of carrying it on. The sons took the busi-  
ness and carried it on in partnership; and it was held that the lands  
formed part of the partnership property, and did not belong to the  
sons as mere joint tenants. In this case, not only was there some  
evidence to show that the sons considered the land as part of their  
property as partners, but there was also this peculiarity, that a  
trading business was left to them, and that the land was accessory  
to that trade; so that it was very difficult, as observed by the Lord  
Chancellor, to sever the profits from the land and to hold the de-  
visees to be partners as to the former, but not as to the latter.

Devises of  
mines.

Crawshay v.  
Maule.

Upon this last ground it was held in *Crawshay v. Maule* (p), that  
mines devised to several persons for the express purpose  
of being worked by them in partnership, and which  
were worked accordingly, were partnership property.

Devise of nur-  
sery grounds.

Waterer v.  
Waterer.

In *Waterer v. Waterer* (q), a nurseryman who carried on busi-  
ness with his sons, although not in partnership, left his  
residuary estate, including the good-will of his busi-  
ness, to his sons in common; they, after his death,  
carried on the business in partnership, and bought more land for  
the purposes of the business, and paid for it out of his estate; then  
one son died, and the others bought his share and paid for it out  
of money raised by mortgage of the nursery ground, and out of  
their father's estate. On the death of one of the surviving sons  
intestate, it was held that all the land thus acquired had become  
partnership property, and that the share of such son was to be  
treated as personal and not as real estate.

By a slight extension of the same principle, if several persons take a  
Land acquired lease of a colliery, in order to work the colliery as part-  
for the pur-ners, and they do so work it, the lease will be partnership  
poses of trade property. (r) So, if co-owners of land form a partnership, and the  
land is merely accessory to their trade, and is treated as part of the  
common stock of the firm, the land will be partnership property. (s)

(o) 9 Ves. 591, and 7 ib. 535. Com-  
pare this with *Brown v. Oakshot*, 24  
Beav. 254, noticed *ante*, p. 652.

(p) 1 Swanst. 495.

(q) *Waterer v. Waterer*, 15 Eq. 402.

(r) *Faraday v. Wightwick*, Tambl. 250,

and 1 R. & M. 45. See *Bentley v.*  
*Bates*, 4 Y. & C. Ex. 182.

(s) *Essex v. Essex*, 20 Beav. 442.  
Compare *Steward v. Blakeway*, 4 Ch.  
603, and 6 Eq. 479.

\* Upon the whole, therefore, it seems that land acquired, \*654 whether gratuitously or not, for the purpose of carrying on a partnership business, and used for that purpose, is to be considered as property of the partnership; but that land which is not so acquired, but which, belonging to several persons jointly or in common, is employed by them for their common profit, does not become partnership property unless there is some evidence to show that it has been treated by them as ancillary to the partnership business, and as part of the common stock of the firm. (t)

Result of foregoing cases.

### SECTION III.—CONVERSION OF JOINT ESTATE INTO SEPARATE ESTATE, AND *VICE VERSA*.

It is competent for partners by agreement amongst themselves to convert that which was partnership property into the separate property of an individual partner, or *vice versa*. (u)<sup>1</sup> And the nature of the property may be

3. Agreement sufficient to alter the ownership of property.

(t) See *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479, and cases *ante*, p. 652.

(u) *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 ib. 3; *Ex parte Fell*, 10 ib. 348; *Ex parte Rowlandson*, 1 Rose, 416.

<sup>1</sup> See *Bullitt v. M. E. Church*, 26 Penn. St. 108; *Hickson v. McFaddin*, 1 Swan, 258; *Sage v. Chollar*, 21 Barb. 596; *Dimon v. Hazzard*, 32 N. Y. 65; *Crosby v. Nichols*, 3 Bosw. 450; *Evans v. Hawley*, 35 Iowa, 83; *City of Maquota v. Willey*, 35 Iowa, 323; *Whitworth v. Benbow*, 56 Ind. 194; *Upson v. Arnold*, 19 Ga. 190.

Where partners have agreed to dissolve their co-partnership, and have divided the partnership property according to their separate interests, the portion allotted to each becomes his separate property, and neither of them, unless he can establish that fraud was committed in procuring the division,

has, by reason of his liability for the partnership debts, or his payment of them, any lien upon the others' portions. He has no remedy, therefore, in equity. *Holmes v. Hawes*, 8 Ired. Eq. 21; *Whitworth v. Benbow*, *supra*.

Two partners, on settlement with a creditor of their firm, after dissolution, gave their separate bonds to the creditor, each for one-half the debt, and agreed that the amount which might be recovered on a certain *chose in action* in the hands of the creditor, which belonged to the firm, should be applied to the payment of the bonds: *Held*, that the joint interest of the partners in the *chose in action* was severed by agreement, and that one partner afterwards had a right to direct his half to be applied to the payment of his bond, and that the creditor had a right so to apply it. *Rowand v. Fraser*, 1 Rich. 325.

Debts due to a firm may be assigned to either of the partners, and a note

thus altered by any agreement to that effect; for neither a deed nor even a writing is absolutely necessary (*v*); but so long as the agreement is dependent on an unperformed condition, so long will the ownership of the property remain unchanged. (*x*)

given to the assignee for the amount due by a debtor to the firm, extinguishes the debt to the partnership. *Lamkin v. Phillips*, 9 Port. 93.

A note in favor of a partner, but entered many months before his death on the partnership books to the credit of the maker, a debtor and customer of the firm, will be treated as a partnership asset. *Gillisse v. Gibson*, 6 La. Ann. 125.

Where a note indorsed in blank by a co-partnership remains after dissolution of the same, in the hands of a partner, who transfers it in payment of his individual debt, in default of showing to the contrary it will be presumed to be his individual property. *Fletcher v. Anderson*, 11 Iowa, 228.

Where a member of a partnership allows his private property to be mingled with that of the firm, and to be sold with their property as part thereof, the purchaser will be liable for the price only to the firm. *White Mountain Bank v. West*, 46 Me. 15.

Where a co-partnership, to which a lien has accrued for work done and money expended upon machinery, is dissolved, and the interest in the lien assigned to one partner, the lien is not lost, but may be enforced by such partner in the firm name. *Busfield v. Wheeler*, 14 Allen, 139.

Where one of the partners buys a horse with his private funds, under an agreement to allow his co-partner to elect to take him at the cost price, and for some days the horse is kept and used with the horses of the partnership, until the partner, in the exercise of his election, sells him, such sale is not a partnership transaction. *Hatch v. Fos-*

*ter*, 27 Vt. 515.

In June, 1871, A, B and C bought in partnership and on speculation certain realty; A and B to furnish the capital needed; C to manage the speculation and to sell the land, receiving as his compensation one-third of the net profits and bearing one-third of the loss. The title to the land was taken by A and B.

In June, 1872, C agreed to take a portion of the land as his share of the profits, and gave to A and B his receipt for such share, specifying the amount, and describing it as received by an agreement from A and B to convey such portion to him subject to the conditions of the contract of partnership. A and B gave to C an agreement to convey on demand to C or his legal representatives the portion of land fixed upon: *Held*, that by this agreement the portion of land specified was taken out of the partnership account; and that A and B held the receipt of C as representing so much money subject to the partnership account and the equities of the co-partners. *Beckwith v. Manton*, 12 R. I. 442.

(*v*) See *Pilling v. Pilling*, 3 DeG. J. & Sm. 162; *Ex parte Williams*, 11 Ves. 3; *Ex parte Clarkson*, 4 D. & C. 56, *per* Sir G. Rose; *Ex parte Owen*, 4 DeG. & Sm. 351. None of these cases, however, turned on the effect of an unwritten agreement relating to land. See, as to a transfer by a partner of his shares in the partnership property when it consists wholly or in part of land, *post*, ch. 5, § 5.

(*x*) *Ex parte Wheeler*, Buck. 25; *Ex parte Cooper*, 1 M. D. & D. 358; *Hawkins v. Hawkins*, 4 Jur. N. S. 1044.

Moreover, as the ordinary creditors of an individual have no lien on his property, and cannot prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the property of the firm so as to be able to prevent it from parting with that property to whomsoever it \*chooses.<sup>1</sup> Accordingly it has frequently been held, that agreements come to between partners converting the property of the firm into the separate estate of one or more of its mem-

Creditors not  
entitled to be  
consulted.

<sup>1</sup> See *Wilcox v. Kellogg*, 11 Ohio, 394; *White v. Parish*, 20 Tex. 638; *Gwin v. Selby*, 5 Ohio St. 96; *Sigler v. Knox Co. Bank*, 8 Ohio St. 511; *Potts v. Blackwell*, 4 Jones Eq. 58; *Field v. Chapman*, 15 Abb. Pr. 434; *Robb v. Mudge*, 14 Gray, 534; *Allen v. Centre Valley Co.* 21 Conn. 130; *Case v. Beauregard*, 1 Woods, 127; *Schmidlapp v. Currie*, 55 Miss. 597; *Pfirman v. Koch*, 1 Cincinnati, 460; *Reeves v. Ayers*, 38 Ill. 419; *Reese v. Bradford*, 13 Ala. 837; *Mayer v. Clark*, 40 id. 259; *State v. Thomas*, 7 Mo. App. 205; *Shackleford v. Shackleford*, 32 Gratt. 481. See, also, *Rankin v. Jones*, 2 Jones Eq. 169; *Miller v. Price*, 20 Wis. 117; *Weaver v. Ashcroft*, 50 Tex. 423; *Locke v. Lewis*, 124 Mass. 1; *Case v. Beauregard*, 99 U. S. 119.

A partner who has purchased and become sole owner of goods which were before partnership property, is entitled to exemption in the goods though at the time the debt sued for was contracted they were partnership property. *State v. Thomas*, 7 Mo. App. 205.

The rights of joint creditors and of those of an individual member, are very different as respects the partnership assets. The joint creditors have a primary claim to satisfaction out of the partnership effects. The claim does not amount to a lien, but in a controversy between joint and separate creditors to satisfaction out of the co-partnership property, the former will be preferred. *Williams v. Gage*, 49 Miss. 777. See *post*, 1054, note.

Creditors have, however, a *quasi* lien

upon partnership effects, which may be enforced in a court of equity as a derivative subordinate right through the lien and equity of the partners. *Guyton v. Flack*, 7 Md. 398; *Black v. Bush*, 7 B. Mon. 210; *O'Bannon v. Miller*, 4 Bush, 25; *Bank of Kentucky v. Herndon*, 1 Bush, 359. See, also, *Tillinghast v. Champlin*, 4 R. I. 173; *Shackleford v. Shackleford*, 32 Gratt. 481. See *post*, 666, note; 1054, note.

The rule that the creditors of a firm have no equitable lien upon the co-partnership property, but can only work out such a lien through the equities of the co-partners, applicable whilst the co-partners are administering their own funds, has no application to the case of a co-partnership dissolved by the death of one of the co-partners, especially if the surviving partner be insolvent, or where, though living, one or both the co-partners have become insolvent or bankrupt, so that their property is in the hands of assignees for distribution. *Tillinghast v. Champlin*, 4 R. I. 173.

Where one partner buys out the whole, agreeing to pay all the debts, the firm creditors have a lien on the property superior to any claims of that partner's private creditors. *Conroy v. Woods*, 13 Cal. 626.

Where a partner gives a mortgage upon his separate property, to secure a partnership debt, he thereby becomes a surety for the firm, and is entitled to the rights and privileges of that character; and his separate creditors succeed to his rights and privileges as such

bers, and *vice versa*, are, unless fraudulent, binding not only as between the partners themselves, but also on their joint and on their

surety, and have a right to insist that the partnership property be first applied towards the payment of the debt, secured by such partner, before resort is had, for that purpose, to the separate estate of the surety; and if the separate estate of the surety is first applied in payment of such debt, his separate creditors will be entitled to be subrogated to the rights of the creditor as against the partnership fund. *Averill v. Loucks*, 6 Barb. 470.

One of three partners retired, selling his interest to the others, taking their note in part payment, and they assumed the partnership debts. They continued the business, awhile as partners, and then failed, and made a general assignment in trust for their creditors, preferring this note, and providing for the payment, *pro rata*, of the debts of both the old and new firms: *Held*, that it being shown that the sale was in good faith, the creditors of the old firm had no equity against the partnership property of the old firm in the hands of the new firm or their assignee, superior to that of the creditors of the new firm. *Smith v. Howard*, 20 How. Pr. 121.

Where, upon the dissolution of a partnership, an agreement is made, within the knowledge of its creditors, that the acting partner shall take the effects and pay all the debts of the firm, a creditor cannot, with a good conscience, take a lien on the joint effects for new advances made by him to the acting partner on the latter's individual account, so as thus to render the retiring partner liable, the joint effects having been exhausted, for the old joint debts. *McClean v. Miller*, 2 Cranch C. Ct. 620.

To authorize any person to demand the aid of the Supreme Court in directing the application of partnership property, he must have a lien, either legal or

equitable, upon it, or must be in a situation to assert such a lien. *Greenwood v. Brodhead*, 8 Barb. 593.

Partnership creditors merely as such, have no lien, on the partnership property before obtaining judgment and execution; but can only be subrogated to the lien of the partners, and are therefore without remedy where such lien has been waived by them. *Case v. Beauregard*, 1 Woods, 127; *McGregor v. Ellis*, 2 Disney (Ohio), 286.

A. and B. dissolved partnership. A. took the stock of goods and agreed to pay their cost value to B. B. took the book accounts, notes, etc., and assumed to pay the debts of the firm. T. became the surety for B., whereupon the latter assigned him in trust the indebtedness for stock due from A. and other property. Joint judgments were recovered against all three of the parties by creditors of the firm. T. paid off the judgments, and the property assigned by B. failing to reimburse him, he filed a bill against A. and others, praying to be subrogated to rights of the creditors of the firm, and to enforce his claim assigned by B.: *Held*, 1. That the judgments having been rendered against T. as well as other parties, and the debts paid by him being firm debts, which he became liable for as the surety nominally of B., who represented the late firm, and which A. was also pre-eminently liable to pay, he ought to stand as surety to the firm and be entitled to be subrogated to all the rights of the creditors thereof. 2. That he was a creditor at large of A. by reason of the assignment, and as such was entitled to file a bill to impeach a fraudulent conveyance of land in which A. was interested. *Highland v. Highland*, 5 W. Va. 63.

One who has purchased of one of a

respective several creditors; and that, in the event of bankruptcy, the trustees must give effect to such agreements. (y)<sup>2</sup>

firm property subject to partnership debts, and has agreed in writing to assume and pay such debts, as part of the purchase price, thereby recognizes the equitable lien of the partnership creditors, and it is not necessary that such creditors should put their claims in judgment before filing a bill to compel such payment. *Olson v. Morrison*, 29 Mich. 395.

Where one partner retires from a firm, selling out his interest in the assets to the remaining partners, who continue the business, and stipulate that they will pay the debts, having sufficient assets for that purpose, if they fail to do so, the firm creditors will have no lien on such property, as the retiring partner may have withdrawn from the assets at the time of his retirement. *Hollis v. Staley*, 59 Tenn. 167.

Notes given by one member of a firm, who assumes the liabilities, and receives a transfer of the effects of the firm, to his co-partners, on a dissolution, cannot be subjected, in the hands of their assignee, to the partnership debts. *Belknap v. Cram*, 11 Ohio, 411.

A creditor of a partnership cannot, unless he has recovered judgment for his debt, file a bill to restrain the partners from applying the partnership property to their separate debts, and for the appointment of a receiver. *Clement v. Foster*, 3 Ired. L. 213.

When, upon some disagreement between partners, their differences were submitted to arbitrators, who awarded that all the goods and other assets of the firm should pass to one of the partners who should pay all the partnership debts, and thereupon such goods and

assets were all attached by private creditors of such partner, and subsequently by the creditors of the firm : *Held*, that the creditors of the firm were entitled to be preferred, even if the award had been executed by a transfer in accordance with it. *Tenney v. Johnson*, 43 N. H. 144.

<sup>2</sup> Upon the dissolution of a partnership, the firm property may, for a valuable consideration, be sold and transferred to one of the partners; and when thus disposed of it is not followed by nor subject to the claims of partnership creditors, as a fund out of which they are to be first satisfied. This rule prevails even though the partner so acquiring the property assumes to pay the partnership debts. *City of Maquoketa v. Willey*, 35 Iowa, 323. See, also, *Baker's appeal*, 21 Penn. St. 77.

A and B being the only co-partners in one company, and being likewise partners with other persons in two other companies, A made a deed-poll to B of all the grantor's interest in certain real estate and in the personal property of the three companies, the deed being nominally for a pecuniary consideration, and containing a covenant that the grantee would indemnify the grantor against all the debts due from the three companies. The deed was accepted by the grantee, but was not executed by him : *Held*, that, as the grantee would be liable in assumpsit as upon an implied promise to pay the creditors and indemnify the grantor, this was a valid consideration for the deed as against partnership creditors of A and B. *Guild v. Leonard*, 18 Pick, 511.

A conveyance by one partner of his

(y) See *Ex parte Ruffin*, and the other cases cited in the last two notes, and *Campbell v. Mullett*, 2 Swanst. 575;

*Ex parte Clarkson*, 4 D & Ch. 56; *Ex parte Peake*, 1 Madd. 358.

A conversion of joint into separate property, or *vice versâ*, most frequently takes place when a firm and one of its partners carry on distinct trades; or when a change occurs in a firm by the retirement of some or one of its members, or by the introduction of a new partner.

interest in real estate belonging to the firm, to his co-partners, in consideration of moneys by them advanced beyond their share in payment of the firm debts, is valid against, and not liable to, the claims of individual creditors of the partner executing the conveyance. *Evans v. Hawley*, 35 Iowa, 83.

A voluntary conveyance by a partner of his individual real estate at a time when the partnership property is sufficient to pay the partnership debts is valid. *Hardy v. Mitchell*, 67 Ind. 485.

Where, upon dissolution, one of two partners takes the property and the right to use the firm name in continuing the business, and agrees to pay the debts, the facts of his continuing in the business under the same style and in the same manner as before, and employing the retiring partner as a salesman at a rate agreed upon, will not, of themselves, warrant the inference that the transfer from the retiring partner was fraudulent as against his creditors, or subject the property to liability to levy by his individual creditor who became such after the dissolution. *Hamill v. Willett*, 6 Bosw. 533.

So, during the existence of a partnership, which is neither bankrupt nor contemplating bankruptcy, one of the members of the firm may with the consent of the other partner or partners, upon a *bond fide* consideration with no benefit reserved, assign and transfer the assets of the partnership in payment of his individual debt, if no lien has attached to such assets, and such transfer is good against the firm creditors. *Schmidlapp v. Currie*, 55 Miss. 597; *Reeves v. Ayers*, 38 Ill. 418.

A transfer by one partner of an interest in, or a lien given by him upon the corpus of the partnership property to pay an individual debt, although made with the consent of the other partners, is fraudulent and void as to the creditors of the firm, unless the firm was at the time solvent and sufficient property remained to pay the partnership debts. *Menagh v. Whitwell*, 52 N. Y. 146.

Members of an insolvent partnership cannot by mutual consent, divide the partnership funds between themselves, so as to enable each member to apply the part allotted to him, in a preferred payment of his separate debts, leaving the joint debts unsatisfied; and a transfer of such partnership property to an individual creditor, in payment of an antecedent debt, with a knowledge on the part of the creditor of such design, will not enable him to hold it discharged from the equitable lien of the partnership creditors. *Burtus v. Tisdall*, 4 Barb. 571. See, *post*, 1054, note.

A distribution by partners among themselves of part of their stock in trade, if made with the assent of creditors, is not fraudulent. *Wilkinson v. Yale*, 6 McLean, 16.

Where a retiring partner *bond fide* assigns all his interest in the stock and effects to the remaining partner, whether the partnership be general or limited, the same thereby becomes separate property, and will be distributable accordingly, notwithstanding the subsequent insolvency of the remaining partner. *Upson a. Arnold*, 19 Ga. 190.

But where partners are in fact insolvent, they should be considered in equity as holding the partnership effects, in

When a firm and one of its members carry on distinct trades, property passing in the ordinary way of business from the partner to the firm, ceases to be his and becomes the property of the partnership, and *vice versa*, just as if he were a stranger to the firm. This was settled in the great

Dealings between one partner and the firm.

trust, for the benefit of the firm creditors, and cannot, by a transfer of the interest of one to the other, defeat this trust. *Re Cook*, 3 Biss. 122.

The division, by partners, of the partnership assets between themselves, and the transfer of such assets by the individual partners, in payment of their private debts, when the partnership is insolvent, has been *held*, in point of law a fraud upon the partnership creditors. *Ransom v. Van Deventer*, 41 Barb. 307.

R., J. and G. form a partnership for the manufacture of tobacco, and in their articles of co-partnership they say, it is understood that G. shall contribute for the purposes of the business such an amount of capital as he may be able to command, which, when contributed, is to be placed to his credit on the books of the concern, to be used only in conducting the business, and to bear interest at six *per cent. per annum*, \* \* \* and in order to protect G. against any losses that may arise from the business, hereby pledge and assign to him all the present and future interest in the stock, machinery and claims of the concern. G. put in \$4,200, the others put in nothing. The business proved unprofitable, the firm failed, and the partnership was dissolved. About the commencement of the partnership they bought machinery, etc., giving the notes of the firm, and a deed of trust upon the machinery, etc., to secure them, and on their failure the trustees sold, and after satisfying the trust there was a balance left. On a contest between the creditors of the partnership and G.: *Held*, 1, That the property never having passed to the separate possession of

G., but remaining in the possession of the partnership, the unrecorded executory agreement aforesaid was fraudulent as to creditors of the firm without notice. 2. About the time the firm failed, to secure G. for his advances, they made a note payable to their own order for \$4,500, secured by deed of trust on the machinery, etc., but the note was not indorsed or delivered to G. The note not having been endorsed or delivered to him by the other, though he took possession of it after the dissolution, G. is not entitled to it. It creates no liability without negotiation, and neither G. nor any of his partners could afterwards negotiate it, and consequently the deed made to secure it is a nullity. *Grasswett v. Connolly*, 27 Grat. 19.

In *Atkins v. Saxton*, 77 N. Y. 195, it was held that a division of co-partnership property between the partners in proportion to their interests, for the purpose of protecting the property from seizure by the individual creditors of one of the partners, is not unlawful, and cannot be avoided as a fraud upon the individual creditors. By such a transaction the other partners do not acquire any of the property of the debtor, but only separate their own from his, so that their portion shall not be interfered with for his debts.

Where one of the partners, by a mortgage deed, conveys to the other partnership effects, to secure debts alleged to be due from the one to the other, which deed and effects are assigned to *bond fide* creditors of the mortgagee, to secure debts due from him to such creditors, such conveyance was *held* to be valid against creditors of the firm who

case of *Bolton v. Puller* (ε), in which there were two banking firms, one carrying on business at Liverpool and one in London.

*Bolton v. Puller.* All the partners in the latter firm were partners in the former. Some bills of exchange came in the ordinary course of business into the hands of the Liverpool firm, to be placed

had no lien. *Potts v. Blackwell*, 3 Jones Eq. 449.

After a levy of executions on partnership property to satisfy a separate debt of one partner, the partners cannot dissolve the partnership, make a settlement of their joint effects, in which the debtor partner is paid over, for his share, an amount in property (other than that levied on) greater than the amount of the executions, and thereby defeat the levies so made. *Thompson v. Tinnin*, 25 Tex. (Supp.) 56. See, also, *Warren v. Wallis*, 42 Tex. 472.

A release from one partner to another of his interest in the partnership effects, taken with full knowledge of, and subject to all the equities between the parties, is not such a sale as would deprive the vendor of his right of action for goods which he alleged such partners as a firm had fraudulently obtained from him. *Ward v. Woodburn*, 27 Barb. 346.

If either partner has contracted a debt in his own name, in which, as between themselves, the other partner should share, that liability is a sufficient consideration as against joint creditors for a transfer of firm property, while free from the operation of insolvent laws, for the payment of that debt. *Marks v. Hill*, 15 Gratt. 400.

A docket entry at the instance of a partner, assigning a firm claim without consideration, is void as against creditors of the firm. *Updegraff v. Rowland* 52 Pa. St. 317.

An appropriation of partnership property for the benefit of private creditors of insolvents, makes void an assignment

for creditors. *Kanauth v. Bassett*, 34 Barb. 31.

In an assignment of all the debtor's goods, chattles, &c., executed by partners, a provision for the payment of the private and individual debts of the assignors out of the residue remaining after the payment of the partnership debts offers no evidence of an intention to hinder, delay or defraud creditors. *Turner v. Jaycox*, 40 Barb. 164.

Where two partners in a firm purchase the interest of a third partner, and form a new firm, and subsequently make an assignment for the benefit of creditors, providing for the payment of debts due from the new firm, or the old firm, "or either of the members" of the two firms, such assignment is invalid, as to creditors of the old firm. *Lester v. Pollock*, 3. Robt. N. Y. 691.

A sale of partnership stock for the purpose of paying the individual debt of a partner, is void as against creditors of the firm, although the money for which such debt was contracted has been used as part of the capital of the firm. *Ferson v. Monroe*, 21 N. H. 462.

One partner may assign his interest in the partnership accounts and property to his separate creditor, and the assignment will be good against the creditors of the firm afterwards attaching. *Wilson v. Bowden*, 8 Rich. 9 ; *Norris v. Vernon*, *id.* 13.

A creditor in embarrassed circumstances, finding the firm of which he is a member about to fail, may at fair prices make a valid transfer of his private property to his private creditors in payment of honest private debts, in prefer-

to the general account of its customers. These bills were remitted by the Liverpool firm to the London firm, to be placed to the credit of the former in the general account between the two houses. Both houses afterwards becoming bankrupt, it was held that the bills were the property of the London firm and not of the Liverpool firm, or of its customers. Lord C. J. Eyre, in delivering judgment, adverted to the question now under consideration in the following terms:—

“There can be no doubt that as between themselves a partnership may have transactions with an individual partner or with two or more of the partners having their separate estate engaged in some joint concern in which the general

ence to those of the firm; provided also there is nothing to impeach the good faith of the grantees. *Auburn, etc. Bank v. Fitch*, 48 Barb. 344.

Where a partner gave a mortgage on his separate property, creating thereby a preference in favor of a partnership creditor: *Held*, that the mortgage was not thereby void and fraudulent as against the separate creditors of the mortgagor; though, on complaint made in their behalf as a class, the mortgage might be declared void as to such creditors. *Stewart v. Slater*, 6 Duer, 83.

Where goods have been purchased in the name and on the credit of one co-partnership firm, and turned over to another co-partnership firm composed of some of the same individuals, without any *bona fide* or valuable consideration being paid therefor: *Held*, that a court of equity will aid the judgment creditors of the co-partners making such transfer, to follow the goods into the hands of the transferees, and require them to account for such goods, or the proceeds of the sale thereof, and apply the same in satisfaction of their judgment. *Dennis v. Ray*, 9 Ga. 449.

A transfer by a partnership, of the partnership property, to a corporation formed by the partners for the purpose, in payment for which the partners take the stock of the corporation in their in-

dividual names, is not *per se* fraudulent as to the creditors of the partnership. *Persse & Brooks Paper-works v. Willett*, 19 Abb. Pr. 416.

Where one of two partners, with the consent of the other, sells and conveys one half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sales and conveyances are not *prima facie* void, as against the creditors of the firm, but are *prima facie* valid against all the world, and can be set aside only by the creditors of the firm, upon their proving the transactions to be fraudulent as against them. *Kimball v. Thompson*, 13 Metc. 283.

Where one partner absconds, and the other disposes of a part, and is disposing of the whole partnership effects, it will be presumed that they intend to delay and hinder their creditors, so as to form good ground for attachment against the partnership property. *Sellew v. Chrisfield*, 1 Handy, Ohio, 86.

Though a creditor might object to a transfer of partnership *choses in action* from the debtor firm to their successors, yet a debtor to the firm cannot object that the old firm had no power to dispose of its property without first settling its affairs. *Pease v. Rush*, 2 Minn. 107.

\*656 partnership is not interested; and that they may by \*their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *é converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business with strangers: for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership."

Where a change occurs in a firm by the retirement of one or more of its members, nothing is more common than for the partners to agree that those who continue the business shall take the property of the old firm and pay its debts, or that part of the property of the old firm shall become the property of those by whom its business is to be continued, whilst the rest of the property shall be otherwise dealt with. So, again, when a partnership is first formed, or when a new partner is taken into an existing firm, or when two firms amalgamate into one, some agreement is generally come to by which what was before the property of some one or more only of the members of the firm, becomes the joint property of all such members. All such agreements, if *bonâ fide*, and not fraudulent against creditors, are valid, and have the effect of altering the equitable ownership in the property affected by them.<sup>1</sup>

In *Ex parte* Ruffin (*a*), which is the leading case on this subject, Thomas Cooper, a brewer, took James Cooper into partnership. That partnership was afterwards dissolved by articles, by which the buildings, premises, stock in trade, debts, and effects were assigned to James by Thomas, who retired. James afterwards became bankrupt, and some of the partnership debts being unpaid, an attempt was made to have what had been the property of the partnership applied in liquidation of those debts. But it was held that such property was no longer the joint property of the two partners, but had been converted into the separate property of James.

<sup>1</sup> See *ante*, 655, note (2).

(*a*) 6 Ves. 119. See, too, *Ex parte* Walker, 4 DeG. F. & J. 509, *Ex parte* Sprague, 4 DeG. M. & G. 866; *Ex parte*

Clarkson, 4 D. & Ch. 56; *Ex parte* Gurney, 2 DeG. M. & G. 541; *Ex parte* Peake, 1 Madd. 346; *Ex parte* Fell, 10 Ves. 348.

\**Ex parte* Williams (b), was a similar case, only that on \*657 the dissolution no assignment was made. There was not even any written agreement showing the terms on <sup>*Ex parte* Williams.</sup> which the dissolution took place. But it was sworn that the partner who continued the business was to take all the stock and effects of the old firm; and it was held that they had become his separate property, and could not be considered as the joint property of the dissolved partnership.

These decisions have always been regarded as settling the law upon the subject of conversion of partnership property, and have been constantly followed. They were not, it will be observed, decided with reference to the doctrine of reputed ownership, but with reference only to the real agreement come to between the partners. They apply as much to cases of a change of interest on death as on retirement. (c)

The case of *Ex parte* Owen (d), which has been already referred to (e), shows that similar principles must be applied in order to determine what, on the formation of a partner- <sup>*Ex parte* Owen.</sup> ship, has been converted from separate into joint estate. (f)

In order, however, that an agreement may have the effect of converting joint into separate estate, or *vice versa*, the agreement must be executed, and not be executory <sup>Agreement must be executed.</sup> merely.<sup>1</sup> In *Ex parte* Wheeler (g), a retiring partner and a con-

(b) 11 Ves. 3. Compare *Ex parte* Cooper, 1 M. D. & D. 358.

(c) See *Re* Simpson, 9 Ch. 572; and compare *Ex parte* Morley, 8 Ch. 1026. Both these turned on the construction of the partnership articles combined in the last case with the will of the deceased partner. The will and the articles together prevented a conversion.

(d) 4 DeG. & Sm. 351.

(e) *Ante*, p. 649.

(f) See, too, *Ex parte* Barrow, 2 Rose, 252; and *Belcher v. Sikes*, 8 B. & C. 185, for a case where separate estate was made joint by a deed of dissolution not clearly expressed.

(g) Buck. 25. See, too, *Ex parte* Cooper, 1 M. D. & D. 358; and the case of the Bank of England, 3 DeG. F. & J. 645, noticed *ante* p. 650; and com-

pare *Ex parte* Gibson, 2 Mont. & Ayr. 4; *Ex parte* Sprague, 4 DeG. M. & G. 866; *Hawkins v. Hawkins*, 4 Jar. N. S. 1044.

<sup>1</sup> Under articles of partnership between A and B, providing that either party could dissolve the partnership upon sixty days' notice in writing, B gave notice, and after the time limited, the parties agreed upon terms of dissolution and a division of the property. By this agreement B was indebted to A, which indebtedness was to be secured to A by mortgage. The agreement was to be reduced to writing and signed by both parties. B, however, refused to sign the agreement when written, or to give the mortgage. The property which was to belong to each was put in separate drawers in a safe, and each partner

tinuing partner entered into an agreement in writing, by which the retiring partner assigned the stock, good-will, lease, furniture, fixtures, books, and debts of the firm, to the continuing partner, and the latter agreed to pay certain debts of the partnership for which his father, he said would be security. The father, \*658 \*however, refused to give any security, and this further act was necessary to be done in order to complete the transfer of the property. The continuing partner having become bankrupt, the court held that the property of the old firm had not been converted into the separate estate of the continuing partner, the agreement being still executory when the bankruptcy occurred.

Moreover, an agreement which can be successfully impeached for fraud, will not affect the property to which it may relate (h); and it must not be forgotten, that in the event of bankruptcy, the trustee, as representing the creditors, may be able to impeach as fraudulent against them, agreements by which the bankrupt himself would have been bound (i). In a case where both the partnership and the individual partners were insolvent, an agreement by one of them transferring his interest to the others, and thereby converting what was joint estate into the separate estate of the transferee, was held invalid; for, although no fraud may have been intended, the necessary effect of the arrangement was to delay and defeat the joint creditors (j). The firm became bankrupt shortly after the assignment was made.

had a key of the drawer in which his part was put: *Held*, that the agreement was not obligatory on A, and had no efficacy to divide the partnership property. *Fitzgerald v. Christt*, 20 N. J. Eq. 90.

With a view to a dissolution, two partners agreed to divide their stock, and that the machinery which belonged to them should be given to the party who would give the most for it. They accordingly separated the stock into "two piles," but no delivery was made, and before the arrangement was completed the parties quarreled, and the settlement was interrupted. One of the parties caused a demand to be made for half of the property: *Held*, that enough had not been done to vest in

the plaintiff a separate, exclusive property in the subject of the suit. *Koningsburg v. Launitz*, 1 E. D. Smith, 215.

Until a partnership concern is closed by a final account, the joint interest in the whole property remains; and if one partner takes out what he deems his share, and the residue is afterwards lost, he will be compelled to account with the other partners for their shares of the amount drawn out by him. *Allison v. Davidson*, 2 Dev. Eq. 79.

(h) *Ex parte Rowlandson*, 1 Rose, 416.

(i) See *Re Kempton*, 8 Eq. 286; *Anderson v. Maltby*, 2 Ves. J. 244; *Billiter v. Young*, 6 E. & B. 40.

(j) *Ex parte Mayou*, 11 Jur. N. S. 433, L. C. *Ex parte Walker*, 4 DeG.

Unsecured creditors of companies, whether limited or unlimited, have no lien on their assets (*k*); and cannot prevent a sale or other disposition thereof (*l*), and it is clearly competent for all companies to divide profits amongst their shareholders, and to that extent to convert what was joint estate into the separate estates of the members. But it must be borne in mind that any division of the property of a company amongst its members which is not warranted by the constitution of the company, can be impeached by the company itself (*m*); and \*further, that any division of the assets of a company which would not leave enough to pay the creditors of the company, would *primâ facie* be a fraud upon them; and even if not a fraud upon them would probably be *ultra vires*. (*n*)

F. & J. 509. See, also, *Luff v. Horner*, 3 Fos. & Fin. 480, which seems to have been a clear case of fraud upon a creditor.

(*k*) But see, as to cost-book companies, 32 & 33 Vict. c. 19, §§ 24, 36.

(*l*) *Mills v. Northern Rail. of Buenos Ayres Co.* 5 Ch. 621.

(*m*) See *Society of Practical Knowledge v. Abbott*, 2 Beav. 559, *ante*, pp.

591, 592.

(*n*) See, as to this, *Stringer's case*, 4 Ch. 475; *Cardiff Coal Co. v. Norton*, 2 Eq. 558, affirmed by Lord Chelmsford, 2 Ch. 405. The decision in this case was probably right under the peculiar circumstances affecting the real plaintiff, but some of the principles laid down in the case deserve serious reconsideration.

## CHAPTER V.

## OF SHARES IN PARTNERSHIPS AND COMPANIES.

In the present chapter it is proposed to determine the nature of shares in general, to point out the respects in which shares in companies resemble and differ from shares in partnerships; and to investigate the doctrines relating to the sale, surrender and forfeiture of shares.

The arrangement of the present chapter is as follows :—

§ 1. Of the nature of a share, and the rules which govern its devolution in case of death.

§ 2. Of the amount of each partner's share.

§ 3. Of the lien which each partner has on the joint property and on the shares of his co-partners.

§ 4. Of the mode in which a share is taken in execution for the separate debts of its owner.

§ 5. Of the transfer of shares.

§ 6. Of sales of shares and questions arising thereon.

§ 7. Of the relinquishment of shares and the right to retire.

§ 8. Of the forfeiture of shares and the right to expel.

#### SECTION I.—OF THE NATURE OF A SHARE, AND THE RULES WHICH GOVERN ITS DEVOLUTION IN CASE OF DEATH.

In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property ; but it is not quite clear whether they are interested therein as tenants in common, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of

\*the partnership property, and to say that it is his exclusive- \*661  
ly. (a) No partner has any such right, either during the ex-  
istence of the partnership or after it has been dissolved.<sup>1</sup>

What is meant by the *share* of a partner is his proportion of the  
partnership assets after they have been all realized and  
converted into money, and all the debts and liabilities Share a right  
to money.  
have been paid and discharged. (b)<sup>2</sup> This it is, and this only, which

(a) *Lingen v. Simpson*, 1 Sim. & Stu. 600; *Cockle v. Whiting*, Taml. 55; and see the cases cited in the next note.

<sup>1</sup> Each partner has a joint interest, but not a separate interest, in any particular property of the partnership, and each has a moiety, or the same species of interest, in the stock-in-trade, whether each contributes exactly in the same proportion or not; but their several degrees of interest must be regulated according to the stipulated proportions and the different conditions of the partnership. Neither partner has any exclusive right to any part of the joint effects, for any sum due to him, until a balance of account be struck. *Taft v. Schwamb*, 80 Ill. 289.

If one partner sells his interest in specific property of the firm, the other may retain possession of it for the purpose of settling the business of the partnership. *Chase v. Scott*, 33 Iowa, 309.

Any appropriation of the partnership property by one partner in payment of his individual debts, without the consent of his co-partners, is a violation of his duty, and a fraud upon them. *Filley v. Phelps*, 18 Conn. 294. See this subject considered *ante*.

Whatever may be the condition of the partnership accounts or of the firm as to solvency, each partner has a property in the partnership assets co-equal to his share in the firm, and retains such interest until it is divested, by due process of law, running against him, or by some voluntary act of his co-partners, done within scope of the partnership. *Berry v. Kelly*, 4 Robt. 106.

(b) See *Doddington v. Hallet*, 1 Ves. 498-9; *Croft v. Pike*, 3 P. W. 180; *West v. Skip*, 1 Ves. S. 342; *Taylor v. Fields*, 4 Ves. 396; *Crawshaw v. Collins*, 15 Ves. 229; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Darby v. Darby*, 3 Drew. 503.

<sup>2</sup> *Smith v. Evans*, 37 Ind. 526; *Carter v. Bradley*, 58 Ill. 101; *Hill v. Beach*, 12 N. J. Eq. 31; *Douglas v. Winslow*, 20 Me. 80; *Perry v. Holloway*, 6 La. Ann. 265; *Schalck v. Harmon*, 6 Minn. 265; *Simpson v. Leach*, 86 Ill. 286; *Filley v. Phelps*, 18 Conn. 294; *Staats v. Bristow*, 73 N. Y. 264; *In re Corbett*, 5 Sawyer, 206; *Hall v. Clagett*, 48 Md. 225; *Conkling v. Washington University*, 2 Md. Ch. 497; *Matlock v. Matlock*, 15 Ind. 404; *Menagh v. Whitwell*, 52 N. Y. 146; *Mayer v. Garber*, 6 N. W. Rep. 63.

Real estate forms no exception to the will stated in the text, but stands upon the same footing as personalty, no matter in whom the legal title may be vested. *Simpson v. Leech*, 86 Ill. 286. See *ante* 652, note.

Only the individual partner's share of the surplus remaining after the payment of claims against the partnership, is liable for his individual debts. *Filley v. Phelps*, 18 Conn. 294. See, *post*, 689, note.

As long as the debts of a partnership are outstanding, it is irregular to undertake to distribute any assets thereof amongst the partners. *Hall v. Clagett*, *supra*.

Either partner may mortgage his interest in the partnership property, and the mortgagee may sell the same on foreclosure, and the other partners can-

on the death of a partner passes to his representatives, or to a legatee of his share (*c*); which under the old law was considered as *bona notabilia* (*d*); which on his bankruptcy passes to his trustee (*e*); and which the sheriff can dispose of under a *fi. fa.* issued at the suit of a separate creditor (*f*),<sup>3</sup> or under an extent at the suit of the Crown. (*g*) It is, however, to be observed that the Crown never holds jointly or in common with its subjects. (*h*) Consequently, if a partner is outlawed, whereby his interest in the partnership is forfeited, the other partners lose their interests also; the Crown first taking the share of the delinquent partner, and then by its prerogative excluding the other partners with whom it would otherwise be a tenant in common. It need hardly be said that this prerogative is not enforced in modern times. (*i*) It has never been, and probably never will be, held that the forfeiture of a share in a company entitles the Crown to the whole property of that company.

Speaking generally, a share in a company signifies a definite portion of its capital. When a company is formed, a sum of money is fixed upon and is called its capital; this sum is divided into a number of equal portions; each of these portions is a share, and whether the sum fixed upon is ever all subscribed or not, and whether what is subscribed is employed profitably, or the contrary, a share retains its original meaning. A share in a company, like

not resist such sale on the ground that the partnership debts exceed the partnership property. The mortgagee is entitled to have the ultimate interest of the mortgagor in the property sold, and the purchaser takes that interest. The sale does not affect the right of the other partners to insist upon the application of the joint property to payment of the firm debts, and to the payment of any balance due them. *Smith v. Evans*, 37 Ind. 526.

A partner has an insurable interest in the property of the firm, and a sale of insured property to a firm of which the vendor is a member, does not vitiate his policy of insurance as to the extent of his interest in the property. *Cowan v. Iowa State Ins. Co.* 40 Iowa, 551.

(*c*) *Farquhar v. Hadden*, 7 Ch. 1.

(*d*) *Ekins v. Brown*, 1 Spinks, Ecc. & Adm. Rep. 400; *A.-G. v. Higgins*, 2 H. & N. 339.

(*e*) See the last note but two, and *Smith v. Stokes*, 1 East, 363.

(*f*) *Skipp v. Harwood*, 2 Swanst. 586; *Re Wait*, 1 Jac. & W. 605; *Johnson v. Evans*, 7 Man. & Gr. 240.

<sup>3</sup> See *Menagh v. Whitwell*, 52 N. Y. 146; and *post*, 689, note.

(*g*) *R. v. Sanderson*, Wightw. 50; *R. v. Rock*, 2 Price, 193; *R. v. Hodge*, 12 ib. 537; *Spears v. Att.-Gen.* 6 Cl. & Fin. 180.

(*h*) 2 Bl. Com. 409; *Hales v. Petit*, Plow. 257.

(*i*) See Collyer on Partn. 72. Forfeiture for felony and treason was abolished by 33 & 34 Vict. c. 23, § 1. See *ante*, p. 80.

a share in a partnership, is, in truth, a definite proportion of the joint estate, after it has been turned into money and applied as far as may be necessary in payment of the joint debts. (*k*)

What are called preferential or guaranteed shares, are nothing more than shares the owners of which are entitled to share profits, to a certain extent, in preference to other shareholders. The holders of preference or guaranteed shares, in a company, are not creditors of, but shareholders in that company; differing from the other shareholders only in being entitled, as against them, to payment of dividends in priority to them. (*l*)

Shares in companies are unfortunately too often regarded by the public in the light of securities. To "invest money in shares" is a common expression not a little calculated to perpetuate this error. But it ought never to be overlooked that a shareholder is a partner in and not a creditor of the company to which he belongs; that if the company becomes insolvent, he cannot recover any part of his money invested until the company's debts are paid in full; that whether he is personally liable for the payment of those debts, and whether the extent of his liability is unlimited or limited, depends upon the nature of the company.

Shares, in short, are not securities; they have been held not to pass under a bequest of bonds, moneys, and securities (*m*); and no lawyer need be told that trustees who invest trust moneys in shares do that which is extremely improper, unless such an investment is clearly authorized by the trust. (*n*) \*Directors who invest the money of their company in shares of other companies are *prima facie* guilty of a breach of trust. (*o*)

A power to invest upon the security of the funds of any company incorporated by act of Parliament, does not authorize an investment in preference railway shares. (*p*)

A power to invest in the stocks, shares, or securities of an incorporated company paying a dividend, authorizes an investment in

(*k*) See *Watson v. Spratley*, 10 Ex. 222; *Sparling v. Parker*, 9 Beav. 450; *Hunt v. Gunn*, 13 C. B. N. S. 226.

(*l*) See *ante*, p. 618.

(*m*) *Ogle v. Knipe*, 8 Eq. 434; *Collins v. Collins*, 12 Eq. 455; *Huddleston v. Goldsbury*, 10 Beav. 547. *Comp. Knight v. Knight*, 2 Giff. 616.

(*n*) Bank Stock and East India Stock are an exception. See 23 & 24 Vict. c. 38, § 11, and Cons. Ord. in Chancery of 1 Feb. 1861.

(*o*) *Hope v. International Financial Soc.* 4 Ch. D. 327; *Joint Stock Discount Co. v. Brown*, 3 Eq. 139.

(*p*) *Harris v. Harris*, 29 Beav. 107.

the stock or shares of an incorporated company paying a fixed rate of interest to its stock or shareholders. But such a power does not justify a purchase or even the retention of stock or shares in the name of one trustee only, even although the regulations of the company do not allow shares to be held in the names of more than one person. (*q*)

In a recent case, a testator bequeathed his residuary estate to his widow for life, and after her death to his daughter and her children. The trustees were expressly authorized to invest in certain shares. An investment in them was made accordingly, but one of the trustees afterwards expressed his unwillingness to retain the investment. A suit having been instituted for the administration of the testator's estate, the Court, at the instance of the testator's grandchildren, ordered the shares to be sold, and the proceeds of the sale to be invested in consols. (*r*)

Although shares are not securities on which trustees can invest without an express power so to do, shares in incorporated companies are stock within the meaning of the Trustee act, 1850, and orders for their transfer under that act may accordingly be made. (*s*)

Shares in companies governed by modern statutes are not, however, mere choses in action; the legal, as well as the equitable, interest in them is capable of transfer; and where the legal ownership in them, or even only the legal right to be registered, is acquired by a *bonâ fide* purchaser for value \*664 \*without notice of a prior equitable interest, the title of such purchaser cannot be impeached. (*t*) At the same time, if a share is equitably assigned or mortgaged more than once, the priority of the assignees or mortgagees will be determined *cæteris paribus*, not by the priority of the assignments or mortgages, but by the priority of the notices thereof, given to the company (*u*); and, as will be seen hereafter, notice to the company is necessary

(*q*) *Consterdine v. Consterdine*, 31 Beav. 330.

(*r*) *Butler v. Withers*, 1 J. & H. 332.

(*s*) See 13 & 14 Vict. c. 60, § 2; *Re Angelo*, 5 DeG. & Sm. 278. See, also, *Re Ives*, 9 Jur. N. S. 611, as to orders under the Lunacy regulation act.

(*t*) *Dodds v. Hills*, 2 Hem. & M. 424, where the vendors were trustees, and

the purchaser had notice of the trust before he procured himself to be registered. See, also, *Ward v. South-Eastern Rail. Co.* 2 E. & E. 812; *Waterhouse v. Jamison*, L. R. 2 Sc. App. 29; *Donaldson v. Gillot*, 3 Eq. 274. *Ex parte Sargent*, 17 Eq. 273.

(*u*) *Cumming v. Prescott*, 2 Y. & C. Ex. 488.

to prevent a share registered in the name of its assignor from being treated in bankruptcy as in his order and disposition. (x)

The general nature of shares having been now explained, it is proposed to examine the rules by which their devolution is governed in case of death. These rules may be divided into two classes, according as they apply to the surviving partners on the one hand and the representatives of the deceased partner on the other, or simply to those representatives as between themselves.

*Of the doctrine of non-survivorship between partners.*

It is an old and well-established maxim, that *Jus accrescendi inter mercatores locum non habet.* (y) This is a common law, and not only an equitable maxim; but whilst Jus accrescendi, &c. its application in equity was subject to few, if any, exceptions (z), it was not at law so universally applicable as the generality of its terms might lead one to suppose.

As regards real property and chattels real, the legal estate in them is governed by the ordinary doctrines of real property law;<sup>1</sup> and, therefore, if several partners are Devolution of legal estate in land.

(x) See *infra*, book iv. ch. 2. *Re Jackson*, 12 Eq. 354, decides that shares are still subject to the doctrines of reputed ownership.

(y) Co. Lit. 182 a.

(z) In *Nelson v. Bealby*, 4 DeG. F. & J. 321, affirming S. C. 30 Beav. 472, articles of partnership provided that on the death of A his executors should receive one-half of the assets from B; but they were silent as to what was to be done on the death of B. It was, however, held that his executors were entitled to half the assets from A.

<sup>1</sup> See the general subject of partnership real estate considered *ante*, 652, note.

Partnership real estate preserves its distinct qualities and descends to the heir, who holds in common with the surviving partners in trust for the purposes of the partnership, first for the creditors and second for the members

of the firm and their representatives. *Hanway v. Robertshaw*, 49 Miss. 758; *Robertshaw v. Hanway*, 52 id. 713; *Piatt v. Oliver*, 3 McLean, 27; *Andrews v. Brown*, 21 Ala. 437; *Bassett v. Miller*, 39 Mich. 133. See, also, *ante*, 652, note; *Holland v. Fuller*, 13 Ind. 195.

The surviving member of a partnership owning real property is something more than a mere tenant in common with the representatives of the estate of the deceased partner. He is trustee for the purpose of winding up the affairs of the firm, and is accountable for the value of the use and occupation of the landed estate of the partnership. *Smith v. Walker*, 38 Cal. 385.

The interest of the survivor in his deceased partner's share of real estate held in the name of the firm, is equitable merely, and one who purchases it under a judgment and execution at law

\*665 jointly seized or \*possessed of land for an estate in fee, or for years, on the death of any one, the legal estate therein will devolve on the surviving partners (*a*); but they are, as regards the interests of the deceased partner, deemed to be trustees thereof for the persons entitled to his estate, and are compellable to account with them accordingly. (*b*) This, however,

Rule as to the equitable estate.

against the survivor, acquires no such title as a court of equity will enforce. *Lang v. Waring*, 17 Ala. 145.

As the surviving partner is charged with the payment of the debts of the firm, he has the right in equity to dispose of its real estate for that purpose; and although his deed will not convey the legal estate to a purchaser, yet it will convey the equity to him, and through it he may compel the heir to to convey the legal title. *Andrews v. Brown*, 21 Ala. 437.

A surviving partner, having the right to the possession and control of the partnership effects, may proceed directly in equity to obtain that possession and control, and to have partition of partnership real estate standing in the name of the deceased. *Gray v. Palmer*, 9 Cal. 616.

In *Whitman v. Boston, etc. R. R. Co.* 3 Allen, 133, it was held that if land is purchased by partners with partnership funds, for partnership purposes, and is not needed for the payment of debts, the title vests in the members of the firm as tenants in common; and after the death of one of them, a petition for damages, sustained by reason of the location of a railroad upon it, is properly brought in the joint names of his administrator and the surviving partner.

Those cases which hold that the heirs of the deceased partner and the survivors hold the legal title, evidently proceed upon the assumption that the land was originally held by the partners as tenants in common. If they are considered as holding as joint tenants, the legal title will of course remain in the

survivors alone, and no interest will descend to the heirs. See *Waugh v. Mitchell*, 1 Dev. & Bat. 510, where it was held that the legal title survived upon the death of a partner, and that a sale of the land ordered in a suit to settle the partnership affairs, bound the heirs of the deceased partner, though not parties to the suit. *Waugh v. Mitchell*, 1 Dev. & B. Eq. 510.

A surviving partner has the right to control real estate held by the partners until the partnership debts are paid and the affairs of the firm finally settled; and until such time the widow of a deceased partner has no separate share in the partnership property. *Cobble v. Tomlinson*, 50 Ind. 550.

Surviving partner cannot partition real property of partnership; that belongs to a court of equity. *Burnside v. Sayier*, 6 Orag. 154.

(*a*) *Jeffreys v. Small*, 1 Vern. 217; *Elliott v. Brown*, 3 Swanst. 489, note.

(*b*) *Jeffreys v. Small* 1 Vern. 217; *Lake v. Craddock*, 3 P. W. 158; *Lake v. Gibson*, 1 Eq. Ca. Ab. 290; *Elliott v. Brown*, 3 Swanst. 489, note; *Lyster v. Dolland*, 1 Ves. J. 435; *Jackson v. Jackson*, 9 Ves. 596, 597. See, also, *Re Ryan*, L. R. Ir. 3 Eq. 222, where the title of persons claiming under a deceased partner prevailed against a mortgagee of the surviving partner; the mortgage being for his separate debt, and the mortgagee having notice of the equitable interest. As to part of the property there was no such notice, and as to that the mortgagee's title prevailed.

is only the case on the assumption that the property in question is partnership property, and forms part of the common stock in which the deceased had an interest as a partner. (*c*)

As regards choses in action, the right to sue for a debt owing to the firm, as well as the liability to be sued for a debt owing by it, also, at law, devolved, in the event of the death of one partner, upon the surviving partners exclusively. (*d*)

Devolution of  
choses in ac-  
tion.

(*c*) *Morris v. Barrett*, 3 Y. & J. 384; *Reilly v. Walsh*, 11 Ir. Eq. 22. A case of a lease acquired for the purpose of a partnership which was never formed. See *ante*, p. 652.

(*d*) *Kemp v. Andrews*, Carth. 170; *Dixon v. Hammond*, 2 B. & A. 310; *Martin v. Crompe*, 1 Lord Raymoud, 340, and 2 Salk. 344; and see *Slipper v. Sidstone*, 5 T. R. 493; *French v. Andrade*, 6 T. R. 582. There is indeed an old case in which an action of *assumpsit* for a partnership debt was held to be properly brought by the executors of a deceased partner, and the surviving partners jointly; *Hall v. Huffam alias Hall v. Rougham*, 2 Lev. 188 and 228, and 3 Keble, 798; but this case is in direct opposition to the last cited, and is contrary to what was clearly settled before the Judicature Acts.

<sup>1</sup>See *Roosvelt v. McDowell*, 1 Geo. 489; *Robinson v. Thompson*, 1 Sm. & M. Ch. 454; *Southard v. Lewis*, 4 Dana, 148; *Childs v. Hyde*, 10 Iowa, 294; *Black v. Struthers*, 11 id. 459; *Maples v. Geller*, 1 Nev. 233; *Burgwin v. Hastler*, 1 Tayl. (N. C.) 124; *Wright v. Storrs*, 6 Bosw. 600; *Wilson v. Nicholson*, 61 Ind. 241; *Barlow v. Coggan*, 1 Wash. Ter. (N. S.) 257; *Davidson v. Weems*, 58 Ala. 187; *Skinner v. Bedell*, 32 Ala. 44; *Davis v. Church*, 1 Watts & S. 240; *Bernard v. Wilcox*, 2 Johns. Cas. 374; *Walker v. Galbrath*, 3 Head, 315; *Marvin v. McRae*, 1 Rice, 171; *McCandless v. Hadden*, 9 B. Mon. 186; *Belton v. Fisher*, 44 Ill. 33; *Nicklaus v. Dahn*, 63 Ind. 87; *Wilson v. Soper*, 13 B. Mon. 411; *Voorhees v. Childs*, 17 N.

Y. 354; *Higgins v. Rockwell*, 2 Duer, 650; *Lane v. Doty*, 4 Barb. 534; *Richler v. Poppenhausen*, 42 N. Y. 373; S. C. 9 Abb. Pr. (N. S.) 263. See, however, *Saunders v. Wilder*, 2 Head, 577; *Remson v. Pomeroy*, 5 Blackf. 383; *Ex parte Ware*, 48 Ala. 223.

If, after dissolution *inter vivos*, the choses in action are left with one partner for collection, and he dies, the title does not vest in his administrator, but in the surviving partner. *Kinsler v. McCants*, 4 Rich. 46.

B. H., after the dissolution of a partnership between himself and S. W., made a negotiable promissory note, in the name of the late firm of W. and H., payable to S. W. and S. F. as partners, under the firm of W. and F.; and after a dissolution of the last-named firm, and the death of S. W., S. F., in the name of W. and F., indorsed the note to himself: *Held*, that S. F. could not maintain an action on the note as indorsee; but that, as surviving promisee, he was entitled to recover on the money counts, against B. H., either as surviving promisor, if the note had been subsequently ratified by S. W., or as sole promisor if it had not been so ratified. *Fowle v. Harrington*, 1 Cush. 146.

A surviving dormant partner may sue alone upon a debt due the partnership. *Beach v. Hayward*, 10 Ohio, 455.

A surviving partner, suing to recover a partnership claim, may join his individual claim in the same action. *Davis v. Church*, 1 Watts & S. 240.

A surviving partner in an action against himself to recover a debt which

In equity, however, the legal personal representatives of a deceased partner were entitled to have a debt due to the partnership

he individually incurred, can set off a claim of the firm against the plaintiff. *Johnson v. Kaiser*, 40 N. J. Law, 280.

A demand due to the plaintiff, as surviving partner of one firm, may be joined in the same action with a demand due to him as the surviving partner of another firm. *Stafford v. Gold*, 9 Pick. 533.

After death of one partner, a suit upon a bond to the partnership, brought by the survivor joining the name of the deceased as if he were still alive, cannot be supported, and the erroneous joinder cured by proof, that at time of suit brought, another person, of the same name with the deceased partner, was living; for this does not prove identity. *Teller v. Wetherell*, 9 Mich. 464.

A judgment recovered in the name of a surviving partner, as such, can be enforced only in his name, or that of his personal representative; a *sci. fa.* to revive cannot be sued out in the name of the administrator of the deceased partner, even after the death of the survivor. *Copes v. Fultz*, 9 Miss. 623.

Where a debt was originally due to two partners, and one has died, and the debtor has done nothing<sup>f</sup> to change his original liability, the action on the debt must be brought in the name of the surviving partner, although, by an agreement between the parties, the beneficial interest was in the deceased. *Clark v. Howe*, 23 Me. 560; *Daly v. Ericson*, 45 N. Y. 786.

So, where one of two partners of a firm retired from it, and assigned all his interest in the store accounts to the other, and the latter afterwards died: *Held*, that actions to recover such debts should be in the name of the surviving partner, and not in that of the personal representative of the deceased one, to whom they had been assigned. *Felton*

*v. Reid*, 7 Jones L. 269.

The administrator of a deceased partner was sued at law by the surviving partner for moneys which he had collected from debtors of the firm. Defense, a dissolution of the partnership before the death, and a division of the accounts of the firm: *Held*, that in order to make this a good defense to the administrator, he must show a division to such an extent as to vest in each partner the absolute property in his share of the accounts. *Shields v. Fuller*, 4 Wis. 102.

On the death of one of two partners, plaintiffs in an action, the survivor, on suggesting the death, may proceed to judgment without any formal judgment in abatement of the suit as to the deceased being entered. *Sprawles v. Barnes*, 9 Miss. 629.

The death of a partner, co-plaintiff in the court below and co-appellant in the supreme court, being suggested, the case may proceed to final judgment in the name of the surviving partner; if, however, either the surviving partner or the appellee moves for a *sci. fa.* to make the representative of the decedent's estate a party, it will be awarded. *Gunter v. Jarvis*, 25 Tex. 581.

A creditor of a firm both members of which are dead, may, to satisfy his debt, on the proper proof, by a surrogate's order, procure a sale of the real estate of one who survived the other, although the latter is shown to have left abundant assets to meet all demands against his estate. *Bridge v. Swain*, 3 Redf. 487.

In an action for money paid, &c., for the use of a partnership, one of the partners having died before the right of action accrued, the promise must be alleged to have been made by the survivors alone; and if alleged to have been

brought into account by the surviving partners (e), and were liable to be proceeded against by a creditor of the firm;<sup>2</sup> and since the

made by the deceased and his survivors, it will be fatal. *Tone v. Goodrich*, 2 Johns. 213.

Where a debtor of a co-partnership stated an account between them admitting a balance due from himself for goods sold in the lifetime of a deceased partner: *Held*, that the survivors might recover such balance on an *insimul computassent*, without stating the death of the other partner and the survivorship; the stating of an account being in the nature of a new promise to the survivors. *Holmes v. De Camp*, 1 Johns. 34.

Payment to an executor or administrator of a deceased partner, of a partnership claim, is no defense to an action by the survivor. *Wallace v. Fitzsimmons*, 1 Dall. 248; *Rice v. Richards*, 1 Busb. Eq. 277.

A surviving partner is the sole representative of the partnership property, and the representatives of the deceased partner need not be made a party to a proceeding at law or in equity affecting such property. *Robinson v. Thompson*, 1 Smed. & M. Ch. 454; *Jones v. Hardisty*, 10 Gill & J. 404.

No joint action can be maintained against the several administrators of deceased partners, for the debt is severed by the death of either, and the remedy must be against their estates severally. *McNally v. Kerswell*, 37 Me. 550.

Where a bill is brought against partners, and one of them dies, no revivor against his representatives is necessary, but the bill may proceed against the survivors; and if it be dismissed for

want of such revival, it is error. *Hammond v. St. John*, 4 Yerg. 107; *Troy Iron & Nail Factory v. Winslow*, 11 Blatch. 513.

No suit at law or in equity can, in this country, be sustained against the representatives of a deceased co-partner, or to charge his estate for the co-partnership debts, if the surviving partners are solvent and the assets of the firm are sufficient. *Troy Iron & Nail Factory v. Winslow*, *supra*. See *post*, 1053, note.

In case of the death of one of the partners, the creditor must exhaust his remedy against the survivor in the first instance, and having failed to collect his debt he may then resort to an equitable action against the representatives of the deceased partner. *Richter v. Poppenhausen*, 42 N. Y. 373; 9 Abb. Pr. N. S. 263. See, also, *Barlow v. Coggan*, 1 Wash. Ter. (N. S.) 257. See *post*, 1053, note.

An action will lie for a partnership debt against the representatives of a deceased partner, after the recovery of a judgment therefor against the survivor and the return of an execution unsatisfied, notwithstanding it may be shown that the survivor had property, out of which the execution might have been satisfied. And payment of a partnership debt may be enforced against the estate of the deceased partner without bringing an action against the survivor, if the insolvency of the latter can be proved. *Pope v. Cole*, 55 N. Y. 124. See, also, *First Nat. Bank v. Morgan*, 73 N. Y. 593.

(e) The receipt of the survivors for a debt due to the firm is good discharge to the debtor, *Brasier v. Hudson*, 9 Sim. 1; *Philips v. Philips*, 3 Ha. 281; and the surviving partner can, without

making the executors of the deceased parties, sustain an action for an account against a debtor to the firm. *Haig v. Gray*, 3 De G. & Sm. 741.

<sup>2</sup> See note, *supra*; also, *post* 1053, note.

666\* \*Judicature acts this diversity between law and equity has ceased to be important.

As regards ordinary chattels, it was held in *Buckley v. Barber* Devolution of ordinary chattels. (f) that the interest of a deceased partner in chattels belonging to the firm did not devolve upon the surviving partners,<sup>1</sup> so as to enable them to give a good legal title to the chattels as against the executors of the deceased; and that consequently such chattels might be seized

Although the general rule is that, when one member of a firm dies, the legal remedy on its contracts is against the survivors only; yet where, pending an action against partners, one died, and his administrators asked and obtained leave to defend, filed a separate answer, and contested the merits: *Held*, that this course waived any objection to the right of plaintiff to proceed at law, instead of in equity, though it did not relieve him from the necessity of showing before the administrator could be charged that the survivors were insolvent. *Sherman v. Kreul*, 42 Wis. 33.

A creditor of a firm who has recovered a judgment against one member thereof upon his guaranty of a firm debt, and issued an execution thereon which has been returned unsatisfied, cannot maintain an action, in the nature of a creditors' bill, to reach the equitable assets of the firm; a judgment must first be recovered against the firm or the surviving partner thereof, and an execution be issued thereon, and returned unsatisfied. *Lewishon v. Drew*, 15 Hun, 467.

Where one of several members of a firm removes from the state, equity has jurisdiction to subject his individual estate to the claims of the creditors of the firm, such estate not being bound by any judgment at law which the creditors might recover against the firm. *Farrar v. Haselden*, 9 Rich. Eq. 331.

As to what averments the declaration should contain in an action by or

against a surviving partner upon a partnership demand. See *Perth Amboy Manfg. Co. v. Condit*, 21 N. J. L. 659; *Knowles v. Byrnes*, 5 Met. 115; *Vandenhewil v. Storrs*, 3 Conn. 203; *Keith v. Pratt*, 5 Ark. 661; *Kennedy v. Richey*, 1 Strobh. 4; *Joyslyn v. Taylor*, 24 N. H. 263; *Bonne v. Kay*, 5 Ark. 19; *Hill v. McNeil*, 6 Port. 29; *Hubball v. Skiles*, 16 Ind. 138; *Ledden v. Colby*, 14 N. H. 33; *Raborg v. Bank of Columbia*, 1 Har. & G. 231; *Culbertson v. Townsend*, 6 Ind. 64.

(f) *Buckley v. Barber*, 6 Ex. 164; and see per Dampier, J. in *R. v. The Collector of Customs*, 2 M. & S. 223.

<sup>1</sup> When a partnership is dissolved by the death of one or more of the partners, the legal title to all the personal property belonging to the firm becomes vested exclusively in the survivor as trustee for the purpose of paying the debts of the firm, and distributing the residue among the parties entitled. *Andrews v. Brown*, 21 Ala. 437; *Hanway v. Robertshaw*, 49 Miss. 758; *Robertshaw v. Hanway*, 52 Miss. 713; *Filley v. Phelps*, 18 Conn. 294; *Strange v. Graham*, 56 Ala. 614; *Barry v. Briggs*, 22 Mich. 201; *Forrester v. Oliver*, 1 Bradwell, 259; *Knox v. Schepler*, 2 Hill (S. C.) 595; *Holland v. Fuller*, 13 Ind. 195; *Filley v. Phelps*, 18 Conn. 294; *Whitmore v. Shiverick*, 3 Nev. 238; *Bassett v. Miller*, 39 Mich. 133. See, also, *Rammelsberg v. Mitchell*, 29 Ohio St. 22. See, however, *Skipwith v. Lea*, 16 La. Ann. 247; *McKowan v. McGuire*,

109 Md. 323 Lewis' "Not surviving partner is not trustee; but has legal title, subject to eq. of repaying deed."

under a *fi. fa.* issued on a judgment obtained against the executors by a separate creditor of the deceased partner. (g) <sup>Goodwill.</sup>

The extent to which goodwill survives will be noticed hereafter. (h)

Before quitting the present subject, it may be observed that the

15 id. 637; *Adams v. Ward*, 26 Ark. 135; *Putnam v. Parker*, 55 Me. 235; *Wilson v. Soper*, 113 B. Mon. 411.

The surviving partner, though legally vested with the title to all firm assets, is also trustee to dispose of them for the best interests of decedent's estate, and is bound to keep its representative fully informed of their condition. *Heath v. Waters*, 40 Mich. 457. See, also, *Ogden v. Astor*, 4 Sandf. 311; *Justices v. McLaren*, 1 Ga. 289.

A sole surviving partner may transfer the choses in action and other personal effects of the partnership, by way of pledge or mortgage, to secure a partnership debt, and when such transfer is made in good faith it is effectual against all other creditors, as well as the representatives of the deceased partner. *Bohler v. Tappan*, 1 Fed. Rep. 469.

The representatives of a deceased partner, before the partnership business has been settled and the debts paid, and while they have not yet been let into joint possession by the surviving partner, have but an equitable interest in the partnership property, and are not tenants in common at law; and the right of action at law for any trespass upon, or injury to the property, which in this case was a store leased by the firm, during this interval, is vested sole-

ly in the surviving partner. *Pfeffer v. Steiner*, 27 Mich. 537.

A surviving partner has a right to the possession and control of the partnership property for the purpose of settling and closing the business, and not for the purpose of carrying it on. *Cline v. Wilson*, 26 Ark. 154. See *Adams v. Ward*, id. 135.

A surviving partner, though he has a legal right to the partnership effects, yet, in equity, is considered merely as the trustee to pay the partnership debts, and to dispose of the effects of the concern for the benefit of himself and the estate of his deceased partner. If he continues the partnership business with the partnership funds, he is, as a general rule, liable to account for all profits made thereby, and the losses, if any, must be borne by himself. *Skidmore v. Collier*, 15 N. Y. Supreme Ct. 50. See, also, *Forrester v. Oliver*, 1 Bradwell, 259.

Upon the death of one member of the firm, the survivor is bound in equity to apply the joint estate to the payment of the joint debts; and the representatives of the deceased partner, and, in case of bankruptcy, the creditors of the firm, may enforce this equity. *Re Clap*, 2 Low. 168.

A partner, by his will, made his

(g) This case was certainly perplexing. It made a useless distinction between land, debts, and ordinary chattels; it logically involved the consequence that a surviving partner could only properly sell his share of a partnership chattel; and it was inconsistent with the principles which induced courts of equity to decline (except under

special circumstances) to grant a receiver at the instance of the executors of a deceased against a surviving partner. In *Taylor v. Taylor*, 7 Mar. 1873, Lord Justice James, sitting for V.-C. Wickens, expressed his disapproval of *Buckley v. Barber*. All this is, however, of little consequence now.

(h) See book iii. ch. 9, § 3.

doctrine of non-survivorship amongst partners is not confined to merchants nor even to traders, but extends to partners generally. (i)

The maxim *Jus accrescendi inter mercatores locum non habet* applies to the property of unincorporated companies to the same extent, and with the same qualifications, as to the property of ordinary partnerships. But the property of a

brother, who was his co-partner, executor, and devised to him the residue of his estate in trust for certain purposes, and authorized him to use in his business the property given him in trust, until it should be wanted for distribution: *Held*, that the intent of the will was, that the residue only should be used in business, and that the surviving partner was bound to settle the affairs and pay the debts of the firm in the usual way, notwithstanding this clause. *Re Clap, supra*.

The surviving partner carried on the business as before, and notified creditors and others dealing with him that his brother's capital remained in the business; he paid the greater part of the joint debts, and contracted new debts; he converted a part of the joint property into money, but less in value than the sum of the joint debts, and became bankrupt, having in possession bank stock and other specific assets, standing in the name of the firm, without change since the death of his brother: *Held*, that a joint creditor of the old firm, who had not received the notice above mentioned, could require that joint property remaining *in specie* as it stood at the death of the deceased partner, should be applied to the payment of his debt in exclusion of the separate creditors of the bankrupt. *It seems*, that if the creditor had received the notice above mentioned, it would not have affected his lien, unless he had

done some act amounting to an election. *Re Clap, supra*.

The fact that the surviving partner was executor and trustee of the deceased partner does not affect the rights of joint creditors, for equitable rights are not lost by the merger or union of different titles in one person; and when bankruptcy occurs, the creditors may themselves assert the lien, which, while the surviving partner is solvent, is vested in the executor of the deceased partner. *Re Clap, supra*.

The rights and liabilities of a deceased partner under the partnership devolve upon the surviving partner. In the settlement with the representatives of the former, the latter would be entitled to credit for a judgment for a firm debt recovered against him without his collusion or neglect. *Hanna v. Wray* 77 Pa. St. 27.

If representatives of a deceased partner undertake, without authority, to affect the rights of the partnership by agreement with a firm creditor, as to a matter over which the survivor had entire control, and not in its nature severable, equity, in relieving him, must treat the agreement as wholly inoperative upon the firm. *Lockwood v. Mitchell*, 7 Ohio St. 387.

The partnership funds in the hands of garnishees may be ordered to be paid over to separate creditors of the surviving partner, on their giving bond and security to answer any claim which may

(i) See *Buckle v. Barber*, 6 Ex. 164; *Annand v. Honiwood*, 2 Ch. Ca. 129; *Jefferys v. Small*, 1 Vern. 217; *Lake v.*

*Gibson*, 1 Eq. Ca. Ab. 290; *Lake v. Craddock*, 3 P. W. 158.

body corporate remains vested in the corporate body notwithstanding any fluctuation amongst its members by death or otherwise. The shares of the individual members of an incorporated company devolve on their respective deaths to their representatives, and not upon the surviving members: and the devolution of such shares as distinguished from the property of the body corporate is conformable to the maxim in question.

\*When a share in a company is held by several persons jointly and one of them dies, the legal title to that share devolves, it is conceived, on the survivors, whatever may be the case as to the equitable title. If the holders are partners, and the share is partnership property, the equitable interest of the deceased will not survive; but if the holders are not partners, the question of survivorship or non-survivorship will depend upon those principles which would be applicable under similar circumstances to other property; and the fact that the regula-

\*667 Shares held by several persons jointly.

afterwards be made on the funds. *Knox v. Schepler*, 2 Hill, (S. C.) 595.

In *Bush v. Clark*, 127 Mass. 111, however, it was held that assets of a partnership in the hands of the surviving partner at his death are so far his personal estate that the probate court may make an allowance therefrom to his widow, although the assets are insufficient to pay the partnership creditors in full.

On the death of the surviving partner, his personal representative succeeds to his right to collect the outstanding accounts of the firm. *Costley v. Wilkerson*, 49 Ala. 210.

The administrator of a surviving partner stands in the same position as the surviving partner in his lifetime. Though he has the legal title to the partnership assets, yet they are assets of the firm, and not of his intestate, and should neither be inventoried as property of his intestate, nor be accounted for as property of his intestate. The administrator is in fact a trustee, whose duty it is to collect the partnership property, and pay the debts of the firm; and after the surplus is ascertained, and

the interests therein settled, to pay the share of the partner first deceased to his personal representatives, and bring the share of the partner last deceased into the account of his estate. *Thomson v. Thomson*, 1 Bradf. 24.

When a partnership agreement to take effect *in futuro* is dissolved by the death of one of the partners before the time fixed for commencing business, no estate intended to be contributed by either partner vests in the partnership, nor does the survivor take anything as such. *Cline v. Wilson*, 26 Ark. 154.

In the articles of co-partnership it was agreed, that in the case of the death of one partner, the other should have the right to recover the fourth part of a certain chattel, and against that he should pay to the estate of the deceased the sum of one thousand dollars, after the estate of deceased should have paid all his debts which he owed to the partnership up to the date: *Held*, that this clause gave the surviving partner an option of purchase, and did not import an absolute covenant or engagement. *Scharringhausen v. Luebsen*, 52 Mo. 337.

tions of the company contain a clause to the effect that no benefit of survivorship shall take place amongst the shareholders will be of little, if any, consequence. For example: shares purchased by A., in the names of himself and B., *primâ facie* belong in equity to A., but if A. dies before B., the legal interest in them devolves on B.; and if the evidence rebuts the presumption which *primâ facie* exists in A's. favor, B. will be entitled to the shares both at law and in equity, although the company's deed may contain such a clause as that just mentioned. (k)

*Of the doctrine that shares are personal estate.*

From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties. (l)<sup>1</sup> And although the decisions upon this point are conflicting, the authorities which are in favor of the above conclusion certainly preponderate over the others. -

In *Thornton v. Dixon* (m), the Court recognized the rule that partnership property must be considered as personal estate; \*but held that the lands which were there in question, could not be so considered, as they had been conveyed to all the partners in common, and there was no agreement for a sale.

In *Bell v. Phyn* (n), partners in trade purchased with the funds of the firm a share in a plantation, and kept the accounts relating to the estate in the partnership books; and it was held upon the authority of the last case, that assuming the land to have become partnership property, it ought not to be regarded as personal estate.

(k) *Garrick v. Taylor*, 4 DeG. F. & J. 159, affirming S. C. 29 Beav. 79.

(l) See, as to this, *Stewart v. Blakey*, 4 Ch. 603, and 6 Eq. 479.

<sup>1</sup>This subject will be found considered

and the cases collected, *ante*, 652, note in connection with the subject of partnership real estate.

(m) 3 Bro. C. C. 199.

(n) 7 Ves. 453.

In *Randall v. Randall* (*o*), the partners were farmers, malsters, and biscuit makers. They bought land for the farming business, and it was held that as it was not acquired for the purpose of any partnership in trade, the land could not be treated as personalty. *Randall v. Randall.*

In *Cookson v. Cookson* (*p*), a father who was seized in fee of land on which he carried on business as a bottle manufacturer, took his son into partnership, and conveyed a share in the land to him. The land was declared by the articles of partnership to be partnership property. But on the death of the father, it was held that his share in the land was to be treated as real estate, no sale being required for the payment of the partnership debts for any other purpose. *Cookson v. Cookson.*

These are the cases which militate against the rule under discussion. The following are those which support it :—

In *Ripley v. Waterworth* (*q*), partnership land was conveyed to trustees upon trust, upon a dissolution of the partnership, to sell and pay the partnership debts, and divide the residue of the money arising from the sale amongst the partners; and it was held upon the death of one of them, that his share in the land was personal estate, although the land was not in fact sold, and the deceased's share in it was purchased by the surviving partners under a clause enabling them so to do, and contained in the conveyance to the trustees. *Ripley v. Waterworth.*

In *Townsend v. Devaynes* (*r*), two persons in partnership as paper makers, purchased paper mills for the use of the firm, and paid for them out of its funds. It was agreed that on the death of either, the survivor should have the option of purchasing his share. One of the partners died, and his share was purchased by the survivor. It was held that the whole of the purchase-money formed part of the personal estate of the deceased, although most of the money was paid in respect of the interest of the deceased in the mills. \*669 *Townsend v. Devaynes.*

In *Phillips v. Phillips* (*s*), two persons in partnership as brewers purchased public-houses for the purposes of their trade, and had them conveyed to both in fee. On the death *Phillips v. Phillips.*

(*o*) 7 Sim. 271.

(*p*) 8 Sim. 529.

(*q*) 7 Ves. 425.

(*r*) 1 Mont. Part. note 2 A. Appx. p.

96; see, too, 11 Sim. 498, note.

(*s*) 1 M. & K. 649. See *ante*, p. 352, note (*m*), as to the estates which were devised, and which were held not converted into personalty.

of one of them, it was held that his share in the houses was to be treated as personal estate.

*Broom v. Broom.* *Broom v. Broom* (*t*) is a decision to the same effect as the last, and decided on its authority.

*Morris v. Kearsley.* In *Morris v. Kearsley* (*u*), a partnership of brewers was possessed of real estate conveyed partly to the partners as tenants in common, and partly to one or more of the partners in trust for the firm; and it was decided that the several lands, hereditaments, and premises belonging to the partnership, ought to be considered as personal estate.

*Houghton v. Houghton.* In *Houghton v. Houghton* (*x*), two brothers, A. and B., were partners as soap boilers. They purchased land for the purposes of their trade, took a conveyance to themselves as tenants in common, and mortgaged the land for the purchase money. They then built on the land, insured the buildings, and paid the expenses and the interest on the mortgage debt out of the partnership funds. A. died intestate, and B. took another brother, C., into partnership. B. and C. paid off the mortgage, and took a reconveyance to themselves as joint tenants in fee, and expended money in building and insurance, defraying the expense, as well as providing the mortgage money, out of the funds of the partnership. On B.'s death it was held that the land and buildings had clearly become partnership property, and that it ought, therefore, to be treated as personal estate.

\*670 *Darby v. Darby.* In *Darby v. Darby* (*y*), two brothers embarked in joint speculations in land. Their scheme was to buy land, convert it into building sites, and then sell it at a profit. This was done on several occasions, the land being generally conveyed to one of them only. On the death of that one it was held that his interest in all the land bought by both, and still unsold, was personal and not real estate.

*Essex v. Essex.* In *Essex v. Essex* (*z*), two brothers were, under the will of their father, seized of freehold lands. They agreed to become partners as curriers and tanners for fourteen years, and to carry on their business on those lands. It was stipulated that if either died during the co-partnership term, the other

(*t*) 3 M. & K. 443.

(*u*) 2 Y. & C. Ex. 139. The report does not state how, when, or for what purpose, the property was originally ac-

quired.

(*x*) 11 Sim. 491.

(*y*) 3 Drew. 495.

(*z*) 20 Beav. 442.

should take his share in the freeholds, and that the entirety thereof, including the plant and tan-pits, should be valued at 5000*l*. The fourteen years expired, but the partnership was continued as before. On the death of one of the partners, it was held that his share in the freeholds was to be regarded as personal estate; they having been converted by the agreement for sale.

In *Waterer v. Waterer* (*a*), the property of a nurseryman, devised by him, with the good will of his business, to his sons as tenants in common, was on the death of one of <sup>*Waterer v. Waterer.*</sup> them treated as personal and not as real estate.

There are also various *dicta* of Lord Eldon in favor of the broad principle that partnership property is to be regarded as personal and not as real estate. (*b*)

Upon the whole, therefore, it is submitted,

1. That notwithstanding *Thornton v. Dixon*, *Bell v. Phyn*, and *Randall v. Randall*, the true rule is, as stated by the Vice-Chancellor Kindersley, in *Darby v. Darby* (*c*), “that <sup>Result of the cases.</sup> whenever a partnership purchases real estate for the partnership purposes, and with the partnership funds, it is, as between the real and personal representatives of the partners, personal estate.” (*d*)

2. That, notwithstanding *Cookson v. Cookson*, no satisfactory \*distinction, with reference to the question of conver- \*671 sion, can be drawn between land purchased with partnership moneys and land acquired in any other way, provided such land is in the proper sense of the expression an asset of the partnership. (*e*)

3. That the general rule may, nevertheless, be excluded by an agreement, express or implied, to the effect that the land shall not be sold. The reason of the rule excludes its application in such a case. (*f*)

Upon this ground it was held in a recent and difficult case, that a farm and quarry worked by co-owners in partnership, and additional lands bought by them out of their <sup>*Steward v. Blakeway.*</sup>

(*a*) 15 Eq. 402, noticed *ante*, p. 652, note (*m*).

(*b*) See the judgment of V.-C. Kindersley, in *Darby v. Darby*, 3 Drew. 499, etc.

(*c*) 3 Drew. 506.

(*d*) See, in addition to the cases referred to above, *Holroyd v. Holroyd*, 7 W. R. 426.

(*e*) See *per* Lord Eldon in *Jackson v.*

*Jackson*, 9 Ves. 593. “It is very difficult to make a distinction between a joint tenancy by will, by a gratuitous deed, or a purchase. The law of merchants, if it applies to one, must apply to all.”

(*f*) *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479.

profits for the purposes of their business, were not to be treated as converted into money. The Court held that no partner could have enforced a sale, either of the original farm and quarry or of the subsequent additions to it. (*g*)

It is well settled that the doctrine of conversion does not apply to co-owners as distinguished from co-partners; nor to property owned by persons, who, although they may be partners in profits are only co-owners of the land which yields them. Thus, where two out of three partners were owners of land occupied by the firm, and for which the firm paid a rent, and the land was in fact kept distinct from the joint property of the three partners, it was properly held, on the death of one of the two partners to whom the rent was paid, that his interest in the land was not to be considered as personal, but as real estate. (*h*) So, if land belongs to all the partners as tenants in common, but not as partners, and that land is used by them for partnership purposes, but is nevertheless intended to remain vested in them as tenants in common, and not to form part of the assets of the firm,

the share of each partner will be real, and not personal estate. (*i*) \*In the case now supposed, co-owners of land are partners, but the co-ownership continues unaffected by the partnership. But it is not possible on this ground to uphold *Thornton v. Dixon*, *Bell v. Phyn*, *Randall v. Randall*, or *Cookson v. Cookson*. In each of these four cases the land had become part of the assets of the firm, or it had not; if it had, these four cases are in direct conflict with those which have been alluded to above; whilst, if it had not, they are in no less direct conflict with other cases which are authorities on the question what is and what is not property of the firm.

The doctrine of conversion which has just been considered, merely amounts to this, that on the death of a partner his share in the partnership is, as between his real and personal representatives, to be treated as money and not as land. In *Custance v. Bradshaw* (*j*) it was decided that probate duty was not payable upon the share of a deceased partner in partnership real estate; but this case has been disapproved, and

The rule only applies to partnership property.

Doctrine of conversion has only a restricted application.

(*g*) *Ibid.*

(*h*) *Rowley v. Adams*, 7 Beav. 548; *Balmain v. Shore*, 9 Ves. 500; see, too, *Phillips v. Phillips*, *ante*, p. 652.

(*i*) *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479.

(*j*) *Custance v. Bradshaw*, 4 Ha. 315.

cannot be relied upon. (*k*) Legacy duty is payable on a partner's share of the assets, part of which consist of real estate. (*l*)

If the shares of the partners in partnership really are of sufficient value, they are not precluded by the equitable doctrine of conversion from voting in respect of those shares at elections for members of Parliament. (*m*)

With respect to shares in companies, they are expressly declared by statute to be personal estate in the following cases:—

Shares in companies usually personal estate.

1. Shares in companies governed by the Companies clauses consolidation act (8 & 9 Vict. c. 16, § 7).

2. Shares in companies governed by the Companies act, 1862 (25 & 26 Vict. c. 89, § 22).

Shares in other companies are also, as a rule, personal and not real estate, by virtue of the general principles which have been already discussed. But it cannot be affirmed that shares \*in companies are universally personal estate, inasmuch as \*673 there are undoubtedly exceptional cases which render it necessary to examine the constitution of every company before the character of its shares can be determined. The point to ascertain is whether the shareholders have individually any interest in land as land, or whether their interest is represented by mere money. (*n*)

In conformity, however, with the general rule, it has been held that shares in a waterworks company will pass under an unattested will if made before the present Wills act (*o*); that shares in dock, canal, mining, or railway companies are not interests in land with-

(*k*) See *A.-G. v. Brunning*, 8 H. L. C. 243, and the case cited in the next note.

(*l*) *Forbes v. Steven*, 10 Eq. 178.

(*m*) *Baxter v. Brown*, 7 Man. & Gr. 199. See, too, *Rogers v. Harvey*, C. B. N. S. 1. Compare *Bennett v. Blain*, 15 C. B. N. S. 581, and *Freeman v. Gainsford*, 18 C. B. N. S. 185, where the partners had no interest in the land, but only in the proceeds of its sale. See, also, *Wadmore v. Dear*, L. R. 7 C. P. 212.

(*n*) See *Morris v. Glynn*, 27 Beav. 218, where shares in an unincorporated iron company, working iron got from its own estates, and having estates for other purposes than those of iron manufacture, were held to be within the

Mortmain act, although by the deed of settlement of the company the shares were declared to be personal estate. This case was, however, disapproved in *Entwistle v. Davis*, 4 Eq. 272. By act of Parliament New River shares are real estate. See *Townsend v. Ash*, 3 Atk. 336. See as to debentures the conflicting cases of *Holdsworth v. Davenport*, 3 Ch. D. 185, and *Chandler v. Howell*, 4 ib. 651. *In re Mitchell's estate*, 6 Ch. D. 655, a railway mortgage debenture was held not to confer an interest in land within the Mortmain acts.

(*o*) *Bligh v. Brent*, 2 Y. & C. Ex. 263, and *Weekley v. Weekley*, ib. 281, *n*.

in the meaning of the Mortmain act; nor within the fourth section of the Statute of Frauds; and do not give a right to vote for members of Parliament. (*p*) And after some conflict of opinion, it seems at last settled that this is so, although the shares are not expressly declared to be personalty in the act, charter, or deed of settlement constituting the company. The cases establishing these propositions are here collected for reference :—

Mortmain acts.      1. *Shares not interests in land within the Mortmain acts.*

Land companies *Entwistle v. Davis*, 4 Eq. 272.\*

Dock companies, *Hilton v. Giraud*, 1 DeG. & Sm. 183; \* *Sparling v. Parker*, 9 Beav. 450; \* *Walker v. Milne*, 11 Beav. 507.\*

674\* \*Railway companies, *Ashton v. Lord Langdale*, 4 DeG. & Sm. 402\* (shares and scrip); *Linley v. Taylor*, 1 Giff. 67, and 2 DeG. F. & J. 84.

Canal companies, *Ashton v. Lord Langdale*, ubi sup.; \* *Edwards v. Hall*, 6 DeG. M. & G. 74; *Walker v. Milne*, 11 Beav. 507.\*

Gas companies, *Sparling v. Parker*, 9 Beav. 450.\*

Waterwork companies, *Ashton v. Lord Langdale*, ubi sup.; \*

Banking companies, *Ashton v. Lord Langdale*, ubi sup. (*q*); \* *Myers v. Perigall*, 11 C. B. 90, and 2 DeG. M. & G. 599.\*

Cost-book mining companies, *Hayter v. Tucker*, 4 K. & J. 243.

Foreign mining companies, *Baker v. Sutton*, 1 Keen, 234.

Insurance companies, see *March v. A.-G.*, 5 Beav. 433, where the question arose on the bequest of a policy payable out of the funds of the company.

Statute of  
frauds, § 4.

2. *Shares not interests in lands within the meaning of the fourth section of the Statute of Frauds.*

Waterwork companies, *Bligh v. Brent*, 2 Y. & C. Ex. 263; *Weekley v. Weekley*, ib. 281, *n*.

Cost-book Mining companies, *Powell v. Jessopp*, 18 C. B. 336; *Walker v. Bartlett*, 18 C. B. 845; *Watson v. Spratley*, 10 Ex. 222. (*r*)

\*In all the cases thus marked, the shares were declared to be personal estate by the company's charter, act, or

deed of settlement. In the other cases nothing was declared as to this point.

(*p*) *Bulmer v. Norris*, 9 C. B. N. S. 19; *Acland v. Lewis*, ib. 32; *Tepper v. Nichols*, 18 ib. 121. See, also, *Bennett v. Blain*, 15 ib. 581, and *Freeman v. Gainsford*, 18 ib. 185.

(*q*) *Ware v. Cumberledge*, 20 Beav. 503, *contra*, was overruled in *Edwards v. Hall*, 6 DeG. M. & G. 74.

(*r*) *Vice v. Anson*, 7 B. & C. 409, in which it was held that a share in a mine

Banking companies, *Humble v. Mitchell*, 11 A. & E. 205.

Railway companies, *Duncuft v. Albrecht*, 12 Sim. 189; *Bradley v. Holdsworth*, 3 M. & W. 422.

Although, however, shares in companies or partnerships holding land are not interests in land, it does not therefore follow that they have all the attributes of goods and chattels. They are not goods, wares, or merchandise within the exception in the Stamp acts, exempting agreements relating to the sale of goods, shares, and merchandise from stamp duty (*s.*) Nor are \*they goods and chattels within the seventeenth section \*675 of the Statute of Frauds, which requires an agreement for the sale of goods and chattels for the price of 10*l.* and upwards, to be in writing. (*t.*) But as will be seen hereafter, shares are goods and chattels within the meaning of the reputed ownership clauses in the Bankrupt acts; their price may be recovered in an action for "goods and chattels" sold and delivered (*u.*); they were *bona notabilia* in the diocese where the chief office of the company was situate (*x.*); they are legal and not equitable assets (*y.*); they pass under a bequest of personal estate (*z.*); and they have been decided to be property in respect of which bail may justify. (*a.*) Whether shares in a cost-book mine are goods and effects attachable in the Lord Mayor's court has been discussed, but not decided. (*b.*)

was real estate, and could not be transferred except by deed is scarcely consistent with the modern decisions. In *Boyce v. Green*, Batty, 608, cited in *Sugd. V. & P.* p. 101, ed. 13, a share in a mining company was held to be an interest in land within the meaning of the 4th section of the Statute of Frauds, the share having been regarded as a share of the land as land, rather than as a share of a money capital. If this really had been so, the case would have been rightly decided (see *Watson v. Spratley*, 10 Ex. 222; *Hayter v. Tucker*, 4 K. & J. 243); but having regard to the terms of the Company's act, it is difficult to arrive at the conclusion that the shareholders had more than a money interest.

(*s.*) *Knight v. Barber*, 16 M. & W. 66.

(*t.*) See *Humble v. Mitchell*, 11 A. & E. 205, as to banking companies; *Tempest v. Kilner*, 3 C. B. 249, as to projected railway companies; *Watson v. Spratley*, 10 Ex. 222, as to cost-book mining companies; *Bowlby v. Bell*, 3 C. B. 284, and *Duncuft v. Albrecht*, 12 Sim. 189, as to railway companies. See, too, *Colt v. Nettervill*, 2 P. W. 304; *Pickering v. Appleby*, Conn. 354.

(*u.*) *Lawton v. Hickman*, 9 Q. B. 563, railway shares.

(*x.*) See *A.-G. v. Higgins*, 2 H. & N. 339, railway shares.

(*y.*) *Cook v. Gregson*, 3 Drew. 547.

(*z.*) *Cadman v. Cadman*, 13 Eq. 470, shares in a canal company.

(*a.*) *Pierpoint v. Brewer*, 10 Jur. 79.

(*b.*) *Tredinnick v. Oliver*, 5 H. & N. 780.

An action may, it is apprehended, be sustained by a shareholder whose title is slandered, and who can prove special damage. (*c*)

Slander of  
title.

## SECTION II.—OF THE AMOUNT OF EACH PARTNER'S SHARE.

The proportions in which the members of a firm are entitled to the property of the firm, or in other words, the amount of each partner's share in a partnership, depends upon the agreement into which the partners have entered.

In the event of a dispute between the partners as to the amount of their shares, such dispute, if it does not turn on the construction of written documents, must be referred to a \*jury. (*d*) And if there is no evidence from which any satisfactory conclusion as to what was agreed can be drawn (*e*), the shares of all the partners will be adjudged equal. (*f*)<sup>1</sup>

Shares are  
prima facie  
equal.

(*c*) See *Malachy v. Soper*, 3 Bing. N. C. 371.

(*d*) As it was in *Peacock v. Peacock*, 16 Ves. 49; *McGregor v. Bainbridge*, 7 Ha. 164; *Binford v. Dommett*, 4 Ves. 756.

(*e*) *Stuart v. Forbes*, 1 Mac. & G. 137; *Webster v. Bray*, 7 Ha. 159; *Copland v. Toulmin*, 7 Cl. & Fin. 349.

(*f*) *Robinson v. Anderson*, 20 Beav. 98, and 7 DeG. M. & G. 239; *Peacock v. Peacock*, 16 Ves. 49; *Webster v. Bray*, 7 Ha. 159; *Farrar v. Beswick*, 1 M. Rob. 527.

<sup>1</sup>A business apparently carried on in partnership without specific terms, is presumed to be upon equal terms, both as to profit and loss, and the partners are presumed to be equally interested until the contrary is shown. *Farr v. Johnson*, 25 Ill. 522; *Moore v. Bare*, 11 Iowa, 198; *Stein v. Robertson*, 30 Ala. 286; *Roach v. Perry*, 16 Ill. 37; *Ratzer v. Ratzer*, 28 N. J. Eq. 136; *Wolfe v. Gilmer*, 7 La. Ann. 583; *Quine v. Quine*,

17 Miss. 155; *Taylor v. Taylor*, 2 Murph. 70; *Jones v. Jones*, 1 Ired. Eq. 332; *Turnipseed v. Goodwin*, 9 Ala. 372; *Honore v. Colmesnil*, 1 J. J. Marsh. 506; *Rider v. Gilbert*, 16 Hun, 163; *Honore v. Colmesnil*, 1 J. J. Marsh. 506.

Articles of co-partnership provided that two partners who were to put in \$2,500, should pay the other interest on the excess of capital put in by him, such capital being a building and machinery valued at \$9,615, and that the losses in business and profits should be divided, one-half to him, and the other half among the other two; and further provided, that the partnership might be renewed when the term expired, and in that event the partners should become equal owners in the capital stock. The partnership was renewed by indorsement on the original articles: *Held*, that each became an equal owner; and that the property put in by the first having been destroyed by fire, the loss

This rule no doubt occasionally leads to apparent injustice ; but it is not easy to lay down any other rule which, under the circumstances supposed, could be fairly applied. Observations on this rule.

It is sometimes suggested that the shares of partners ought to be proportionate to their contributions; but without in any way denying this, it may be asked, how is the value of each partner's contribution to be measured ? Certainly not merely by the capital he may have brought into the firm. His skill, his connection, his command of the confidence and respect of others, must all be taken into account; and if it is impossible to set a money value on each partner's contribution in this respect, it is obviously impossible to determine in the manner suggested, the shares of the partners in the partnership. Nor can it be said to be unreasonable to infer, in the absence of all evidence to the contrary, that the partners themselves have agreed to consider their contributions as of equal value, although they may have brought in unequal sums of money, or be themselves unequal as regards skill, connection, or character. Whether therefore, partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection, or character, whether they have or have not labored equally for the benefit of the firm, their shares will be considered as equal, unless some agreement to the contrary can be shown to have been entered into. (*g*)

should be borne equally by all. *Taft v. Schwamb*, 80 Ill. 289.

In case of an association for manufacturing purposes, not incorporated, in the absence of an agreement to the contrary, each will be liable in equal proportions for any loss that may be sustained, but, if by the articles of association, they are to share in the profits in proportion to the stock each puts in, then the loss must be shared in the same manner. *Flagg v. Stowe*, 85 Ill. 164.

Partners share equally in the profits and losses of a firm, in the absence of any agreement to the contrary, notwithstanding they may have put in unequal portions of capital. *Griggs v. Clark*, 23 Cal. 427. See *post*, 807, and note.

Where the concubine of defendant

has contributed equally with him her labor and capital in a universal partnership, she will be entitled to half the profits and immovables acquired with the proceeds of their business, which, though registered in his own name, he has in repeated letters acknowledged to be their joint property. *Delamour v. Roger*, 7 La. Ann. 153.

As between the parties forming a partnership, the executive or managing partner may bind himself to repay to the other partner, on dissolution, the capital advanced by him, whether profits are made or not. *Ford v. McBride*, 45 Tex. 498.

(*g*) See the last three notes. *Peacock v. Peacock*, 2 Camp. 44, and *Sharpe v. Cummings*, 2 Dowl. & L. 504, which was apparently decided on its authority,

When it is said that the shares of partners are *primâ facie* equal, although their capitals are unequal, what is meant is that losses of capital like other losses must be shared equally;<sup>2</sup> \*but it is not meant that on a final settlement of accounts, capitals contributed unequally are to be treated as one aggregate fund which ought to be divided between the partners in equal shares. (*h*)

Meaning of equality.

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An agreement for inequality may be conclusively inferred from the mode in which the partners have dealt with each other, and from the contents of the partnership books. (*i*)

Evidence showing inequality.

Moreover, if an agreement for inequality clearly at one time existed, no presumption of any alteration in this respect will arise from the mere fact, that some of the original members have retired. In the absence of evidence to the contrary, the inference is that the shares of the retiring members have been taken by the continuing parties in the proportions in which these last were originally interested in the concern. (*h*)

The rule that the shares of partners are equal, unless they have agreed for inequality, applies as well to persons who are partners in business generally, as to those who are partners as regards one single matter only. Thus in *Robinson v. Anderson* (*l*), where two solicitors, not in partnership, were jointly retained to defend certain actions, and there was no satisfactory evidence to show in what proportions they were to divide their remuneration, it was held that they were entitled to share it equally, although they had been paid separately and had done unequal amounts of work. The Master of the Rolls, after observing on the importance in such cases of attending to the *onus probandi*, said:

Rule as to presumptive equality applies to partnerships in single transactions.

*Robinson v. Anderson.*

"Now I should entertain no doubt, even if I had not been confirmed by the two cases of *Webster v. Bray*, and *McGregor v. Bainbridge*, that where two solicitors undertake a matter of business on behalf of a client, the same rule would follow

cannot be supported. See, as to Scotch law, *Thompson v. Williamson*, 7 Bli. N. S. 432; 3 Ross, L. C. on Com. Law, 381.

<sup>2</sup> See *post*, 307 and note.

(*h*) See *infra*, ch. 8, § 1, on partnership accounts.

(*i*) As in *Stewart v. Forbes*, 1 Mac. & G. 137.

(*h*) *Robley v. Brooke*, 7 Bli. N. S. 90; and see *Copland v. Toulmin*, 7 Cl. & Fin. 349.

(*i*) 20 Beav. 98, and 7 DeG. M. & G. 239. See, too, *Webster v. Bray*, 7 Ha. 159, and *McGregor v. Bainbridge*, ib. 164, note; *Hanslip v. Kitton*, 8 Jur. N. S. 835, V.-C. S.

in that, as in any other undertaking, where two persons carry on a business jointly on behalf of themselves or as agents of other persons. It is, in point of fact, a limited partnership for a particular sort of business. Assuming nothing to have been said as to the manner in which the profits were to be divided, it appears to me follow as a necessary consequence of law, that they are to be divided equally between them. \*And although one may do more business, and \*678 have exerted himself more than the other, yet if nothing is said upon the subject of profit, the presumption is that they are to be equally divided between them. It appears to me, that if the clients had gone to Mr. Robinson and Mr. Anderson, and said—We wish you to undertake the business for us, and thereupon Mr. Robinson and Mr. Anderson had both said, We agree to do so, and nothing had taken place between them as to the manner in which they were to be paid, the necessary consequences would have been that after payment of the costs out of pocket, the net profits made by the business would have been divisible equally between them, and that neither of them could say to the other—I have done more business than you have, and am therefore entitled to a larger share of profits. It was the duty of the party who intended that this should not be a partnership transaction, and that he should be paid for the amount of business which he did without participating in that of the other, so to express himself.”

A question of some difficulty arises when a firm, say of two partners, engages in a partnership speculation with a third person not a member of that firm. Is the interest of such person in the speculation to be treated as one half, the other two persons being treated as one? or is the interest of each of the three to be treated as equal, each taking one-third? The answer to these questions must depend upon whether the two partners entered into the speculation as a firm or as two individuals. If the former, there will in substance be only two parties interested in the speculation, and the profits thereof must be divided into two equal parts; whilst if the latter is the case, there will be three parties interested, and the profits must be divided into three equal parts. (*m*)

Applications of rule where one firm comprises another.

With respect to shares in companies, it is to be observed, that they are formed in the first instance by dividing the capital of the company into equal parts, and the only question which can arise is as to the number of parts or shares to which the members of the company are respectively entitled. This is a mere matter of evidence; but supposing that it should so happen that there is *no* evidence to show the number of shares held by the members or any of them, it would be difficult to come to any other conclusion than that each member was entitled to an equal

Application of rule to shares in companies.

(*m*) See *Warner v. Smith*, 1 DeG. J. to be divisible into two and not three & S. 337, where the profits were held parts.

number of shares, to be ascertained by dividing the total number of shares by the total number of members. \*Shares in companies, like shares in partnerships, must be taken to be equal, unless the contrary is proved.

In point of fact, shares in a company always are equal, except when there have been successive issues of shares arising from successive increases of capital. But it sometimes happens that a capital of a certain amount divided into a certain number of equal shares, is raised; and that then a further capital is raised by the issue of a certain number of new shares, equal to each other, but not equal to the old shares. Moreover, it sometimes also happens, that whilst the old shareholders have paid up their shares in full, the new shareholders have paid in respect of theirs, less than the amount per share paid up by the old shareholders. In such a case there is not only inequality of shares, but inequality of money paid in respect of them; and questions then arise as to the relative rights of the holders of the different kinds of shares, and especially with respect to the payment of dividends, and in case of dissolution, the apportionment of surplus assets. Generally speaking, such questions are determined by reference to the company's act, charter, or deed of settlement; but where they cannot be so determined, the rights of the shareholders to profits and surplus assets will be proportionate to the money paid to the company in respect of their respective shares, and not to the nominal value of such shares. If one shareholder has paid 100*l.*, and another only 50*l.*, it is clear that unless some reason to the contrary can be shown, the first ought to receive for dividends, and surplus assets, twice as much as the last. (*n*)

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### SECTION III.—OF THE LIEN WHICH EACH PARTNER HAS ON THE PROPERTY OF THE FIRM, AND ON THE SHARES OF HIS CO-PARTNERS.

In order to discharge himself from the liabilities to which a person may be subject as partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm. And in order to secure a

(*n*) See *Somes v. Currie*, 1 K. & J. 605.

\*proper division of the surplus assets, he has a right to have \*680 whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership.

In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; Foundation of partner's lien. and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm. (o)<sup>1</sup>

(o) *West v. Skip*, 1 Ves. S. 239; *Skipp v. Harwood*, 2 Swanst. 586; *Doddington v. Hallet*, 1 Ves. S. 498 and 499; *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 ib. 3; *Holderness v. Shackels*, 8 B. & C. 612. *Smith v. DeSilva*, Cowp. 469, can hardly be reconciled with the other cases, but see upon it the observations of Lord Tenterden, in 8 B. & C. 618. As to the right of a minority of partners to insist on the payment of a partnership debt out of the partnership assets, see the observations of Turner, V.-C., in *Stevens v. The South Devon Rail. Co.* 9 Ha. 326. Any member of an ordinary firm is at liberty to pay any debt of the firm, and to charge the firm with the amount paid.

<sup>1</sup> See *Matlock v. Matlock*, 5 Ind. 404; *Strange v. Graham*, 56 Ala. 614; *Wade v. Rusher*, 4 Bosw. 537; *Allen v. Hawley*, 6 Fla. 142; *Boyce v. Coster*, 4 Strobb. Eq. 25; *Hunt v. Benson*, 2 Humph. 459; *Sage v. Chollar*, 21 Barb. 596; *Talbot v. Pierce*, 14 B. Mon. 195; *Saloy v. Albrecht*, 17 La. Ann. 75; *Parish v. Lewis*, 1 Freem. (Miss.) Ch. 299; *Donelson v. Posey*, 13 Ala. 752; *Duryea v. Burt*, 28 Cal. 569; *Pearson v. Keedy*, 6 B. Mon. 128; *Black v. Bush*, 7 id. 210; *Crooker v. Crooker*, 46 Me. 250; *Williams v. Love*, 2 Head, 80; *Frith v. Lawrence*, 1 Paige, 434; *Conwell v. Sandidge*, 8 Dana, 273; *Meador v. Hughes*, 14 Bush, 652; *Warren v. Tay-*

*lor*, 60 Ala. 218; *Parker v. Parker*, 65 Barb. 205; *Meridan Nat. Bank v. Brandt*, 51 Ind. 56; *Pearl v. Pearl*, 1 Tenn. Ch. 206; *Nelson v. Hayner*, 66 Ill. 487; *McCauley v. Fulton*, 44 Cal. 355; and cases there cited. See, also, *Ex parte Shepherd*, 3 Tenn. Ch. 189; *Milner v. Price*, 20 Wis. 117; *White v. Colfax*, 33 N. Y. Superior Ct. 297.

An agreement between two firms to purchase hogs and pack pork, one season on joint account, constituted a partnership as to that adventure, and whether regarded as a partnership or on joint account, the same equities exist between the parties. The fact that one firm had control of the product, and could alone sell, did not destroy the right of the other to have the partnership assets applied to the payment of the partnership debts. *Meador v. Hughes*, 14 Bush, 652.

The effects of a partnership cannot be exempted from payment of the firm debts without the consent of all the partners; and if a mere dissolution takes place, it will be presumed that the one partner to whom the assets are handed over, holds them in trust to pay the firm debts, etc. *People v. Till*, 3 Neb. 261.

Where a partner sells his interest to a stranger, or it is sold upon execution against him, his right to have the partnership debts paid, and his liability

This right, lien, *quasi-lien*, or whatever else it may be called, does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained; nor has any partner a right to insist as against a judgment creditor of the firm, that he shall have recourse to the assets of the firm before seeking to obtain payment from the partners individually. (*p*) But when partnership accounts have to be taken, and the shares of the partners have to be

therefor discharged out of the property, is not divested by the sale. This right is not affected by the fact that the separate interests of all the partners are thus disposed of. *Menagh v. Whitwell*, 52 N. Y. 147.

If the assets of a firm composed of A, B and C are applied to pay the debts of a former firm of A and B, without C's consent, A and B are liable *in solido* to A, B and C, and A and B in equity are liable to C for his share if such debts. *Raigul's Appeal*, 80 Pa. St. 234.

D. and P. shipped a cargo on a foreign voyage on a joint account, in the name of D.; after the vessel sailed, D. assigned his undivided moiety for the benefit of creditors, and the return cargo came into the hands of his trustees. They refused to pay P. more than his undivided moiety of the proceeds of the return cargo, but it appearing that in fact he had paid more than his moiety on account of this partnership transaction, and with a view to it: *Held*, upon a bill filed against the trustees, of which he was one, that he had a lien on D.'s moiety of the proceeds for his reimbursement. *Pierce v. Tiernan*, 10 Gill & J. 253.

If, on the settlement of the firm affairs, one partner is found to be indebted to the other, the latter may retain enough of the firm assets to cancel the indebtedness, if they are in his hands, and the firm debts are all paid; but if he does not have such means in his

hands, and cannot procure them, his only remedy is to collect the amount from his partner as a debtor. *Mack v. Woodruff*, 87 Ill. 570.

That a partnership may happen to be in debt does not, however, give one partner the right to prevent the other from taking possession of the partnership property. *Carithers v. Jarrell*, 20 Ga. 842.

A retiring partner who, upon dissolution of a firm, has withdrawn part of the assets for his individual use, will not be sustained in holding such fund, unless there is clear proof that the fund left for creditors of the firm was ample for all demands. That he has invested the fund withdrawn in a homestead gives it no protection, at least as against proceedings in equity. *Re Sauthoff*, 16 Bankr. Reg. 181.

Ordinary joint owners may at their pleasure sell their joint interest and then destroy their joint tenancy. A partner cannot sell his interest in the partnership property so as to deprive his cotenants of their lien on the property for partnership debts or liabilities due from the party selling, nor can a mortgage executed by one partner have such effect. *Whitmore v. Shiverick*, 3 Nev. 288.

In a controversy between one partner and a purchaser from the other, after the dissolution of the partnership, it is competent to show that the partnership debts had all been paid prior to the sale. *Hobendobler v. Lyon*, 12 Kan. 276.

(*p*) See *ante*, p. 516.

ascertained, the lien of the partners on the assets of the partnership, and on each other's shares, becomes of the greatest importance. Whilst the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not therefore lost by the substitution of new stock in trade for old. (q) Further, on the death or bankruptcy of a partner, his lien continues in favor of his representatives or trustees, and does not terminate until his share \*has been ascer- \*681 tained and provided for by the other partners. (r) But after a partnership has been dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business. In this respect the lien in question differs from the lien of a mortgagee on a varying stock-in-trade assigned to him as a security for his loan. (s)

It follows from the principle on which the lien of a partner is founded, that it only extends to the property of the firm, and to the separate interest of each partner in such property.<sup>1</sup> In those cases, therefore, where there is a partner-

The lien of a partner on partnership effects arises on a balance due him on the partnership accounts, occurring after as well as before a dissolution. *Hodges v. Holeman*, 1 Dana, 50.

One part owner of merchandise, who has given bonds, as principal, to secure the payment of the duties thereon, and who afterwards pays the duties, acquires no lien upon the merchandise by virtue of any statute of the United States. *Ladd v. Billings*, 15 Mass. 15.

Where one of the members of a partnership put in, as part of his share of the capital, the land on which mills (the partnership property) were built, but did not make any conveyance to the others, and sold out, reserving a lien on

the land for the price, and on a settlement, was found indebted to another partner: *Held*, that it was erroneous, after decreeing against him personally the amount of his deficiency, to decree him to convey the land to the firm for the benefit of purchasers, and thereby defeat his own lien. *Savage v. Carter*, 9 Dana, 408.

<sup>1</sup>The lien which partners have upon the partnership property, to enforce its application to the payment of the partnership debt, attaches to all their joint property, but relates no further. Partners, as such, have no other equities in relation to the separate property of each other, than separate creditors. *Mann v. Higgins*, 7 Gill, 265. See,

(q) See *West v. Skip*, 1 Ves. S. 239; *Skipp v. Harwood*, 2 Swanst. 586; *Stocken v. Dawson*, 9 Beav. 239, and 17 L. J. (Ch.) 282. Compare the cases in the next note but one.

(r) See *Stocken v. Dawson*, 9 Beav. 239, affirmed 17 L. J. (Ch.) 282, and the

cases cited in note (q).

(s) *Payne v. Hornby*, 25 Beav. 280. See, too, *Nerot v. Burnand*, 4 Russ. 247, and 2 Bli. N. S. 215, ante, p. 646. *Ex parte Morley*, 8 Ch. 1026. Compare the cases in the last note but one.

ship in profits only, but that which produces those profits belongs exclusively to one of the partners, the lien of the others is confined to the profits, and does not extend to that which produces them. (t)<sup>2</sup> Moreover, if two persons engage in a joint adventure, each consigning goods for sale upon the terms that each is to have the produce of his own goods, neither of them will have a lien on the goods of the other, nor on the produce of such goods, although each may have raised the money to pay for his own goods by a bill drawn on himself by the the other, and ultimately dishonored. (u)

The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them; and it is therefore available against their executors, execution creditors, and trustees in bankruptcy. (v) To hold, however, that this lien could be enforced against persons purchasing partnership property, would be in effect to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade. Whilst, therefore, a person who purchases a share of a partner takes that share subject to the liens of the other

\*682 partners (x),<sup>3</sup> a \*person who *bonâ fide* purchases from one

also, Mack v. Woodruff, 87 Ill. 570.

Co-partners cannot claim an equitable lien in property purchased by one partner with money which he has drawn by their consent from the firm, though in excess of his share. McCormick v. McCormick, 7 Neb. 440.

Where a partner in a firm purchased a slave in his own name, but used the means of the firm for a small part of the purchase-money, and the slave was afterwards employed, in part, in the service and for the convenience of the firm, without compensation for such employment: Held, that the partner purchasing the slave was chargeable in an account between the partners, for money of the firm applied to his own

use, but that the firm had no lien on the slave for such money. Cabaniss v. Clark, 31 Miss. 423.

<sup>2</sup> Where one partner simply puts into the firm the use of his machinery or other personal property, and the other advances money and assumes liabilities, the latter being in possession, will have the right to retain the property until he is reimbursed for any excess paid by him, and for indemnity against outstanding liabilities. Flagg v. Stowe, 85 Ill. 165.

<sup>3</sup> Boyce v. Coster, 4 Strobb. Eq. 25; Glynn v. Phetteplace, 26 Mich. 383.

Each member of a partnership has a lien on the shares of his co-partners, for extra advances made by him, enforce-

(t) See *infra*, as to the lien of co-owners.

(u) *Ex parte* Gemmel, 3 M. D. & D. 198.

(v) West v. Skip, and other cases

cited, *ante*, note (q).

(x) Cavander v. Bulteel, 9 Ch. 79. See as to companies with transferable shares, *infra*.

partner specific chattels belonging to the firm, acquires a good title to such chattels, whatever liens the other partners might have had on them prior to their sale. (y)<sup>1</sup>

In *re Langmead's trusts* a partnership between A. and B. was dissolved. A. retired, and by deed agreed to execute an assignment to B. of the partnership assets (part of <sup>*Re Langmead's Trusts.*</sup> which consisted of a policy of which the partners were assignees), and B. agreed to covenant to pay the partnership debts, and indemnify A. against them. No further instrument was executed. A. died, and B. afterwards assigned the policy by way of mortgage to a person who had notice of the deed. A.'s executors were afterwards compelled to pay partnership debts, which ought to have been discharged by B., and B. became bankrupt. The policy being adversely claimed by the mortgagee, by A.'s executor, and by a purchaser from B.'s assignees, it was held that, even if A. and his executors had been entitled to pursue any portion of the partnership property in the hands of B., and to have it applied in payment of the partnership debts, yet that they had no such right as against the purchaser from B., though with notice, for he was not bound to see to the application of the purchase money. (z)

able on the dissolution of the partnership; and where a new partner bought the interest of a retiring partner, who was indebted to the firm, agreeing to indemnify him against all the partnership debts: *Held*, that they must be considered as purchasers with notice, and that the lien of the remaining partner must be satisfied, before a mortgage given by the new partners on the share bought by them, to the retired partner, could be paid out of the partnership effects; that advances made subsequently to the date of the mortgage must be postponed to it; and that on a bill to foreclose such mortgage, all the members of the partnership are necessary parties. *Conwell v. Sandidge*, 8 Dana, 273.

(y) See *Re Langmead's Trusts*, 20 Beav. 20, and 7 DeG. M. & G. 353.

<sup>1</sup>The partner to whom a balance is due, has a lien upon the partnership

property and upon other property into which it may have been converted by the debtor partner, not only as against him, but as against all assignees of it who are not *bona fide* purchasers of it for value. *Wade v. Rusher*, 4 Bosw. 537; *Meridan Nat. Bank v. Brandt*, 51 Ind. 56; *Williams v. Love*, 2 Head, 80; *Pierce v. Wilson*, 2 Iowa, 20; *Addison v. Burckmyer*, 4 Sandf. Ch. 498.

One partner cannot, by a conveyance in trust for the payment of his individual and partnership debts, defeat the lien of the other partner on the partnership funds. *Bank of Kentucky v. Herndon*, 1 Bush, 359.

Parties, however, who have purchased, and in good faith paid for the stock of a partnership concern, are not liable for the debts of that concern, nor are the goods liable. *Frank v. Peters*, 9 Ind. 343.

(z) *Ibid*.

The lien of partners on the partnership property extends, as has been stated, to whatever is due to or from the firm, by or to the members thereof, as such. It does not, however, extend to debts incurred between the firm and its members, otherwise than in their character of members.<sup>2</sup> It has therefore been held that where a partner borrowed money of the firm for some private purpose of his own, and then became bankrupt, his assignees were entitled to his share in the partnership, ascertained without taking into account the sum due from him to the firm in respect of this loan; and that the solvent partners were driven to prove against his estate in order to obtain payment of the money lent. (a) This qualification of the general rule \*is peculiarly applicable to companies, and to debts contracted between them and their members. And it has been held that if a shareholder in a company borrows money of the company for purposes of his own, and the company deals with him as if he were a stranger, it has no lien on his shares in respect of the money so borrowed (b), unless there is some special agreement creating such a lien. (c)

Further, a partner's lien on partnership property, is lost by the conversion of such property into the separate property of another partner. Therefore, if on a dissolution it is agreed between the partners that the property of the firm shall be divided in specie among them, and that the debts shall be paid in some specified manner; and if the property is accordingly di-

<sup>2</sup> Although one partner has a lien upon the partnership effects for moneys advanced by him to the partnership beyond his share of the capital, he has no such lien for money advanced or lent to an individual partner, though a mortgage or judgment against such partner, if properly executed or entered, will be a prior lien on such partner's share. *Uhler v. Semple*, 20 N. J. Eq. 288.

Money borrowed or goods bought by one partner on his own security only, whether before or during the existence of the partnership, although used for partnership purposes, and with the knowledge of the other partner, is not sufficient to make the lender a creditor of the firm; and the partner's lien for the

advance, beyond his share, is only *inter se*, and not a lien against creditors of the firm. *Ketchum v. Durkee*, 1 Hoffm. 538.

(a) See *Ryall v. Rowles*, 1 Ves. S. 348, and 1 Atk. 165; and *Meliorucchi v. The Royal Exchange Ass. Co.* 1 Eq. Ab. 8; and *Croft v. Pike*, 3 P. W. 180. Perhaps *Smith v. De Silva*, Cowp. 459, was decided on this principle, as suggested by Lord Tenterden, in 8 B. & C. 618.

(b) See *Pinkett v. Wright*, 2 Ha. 120; affirmed 12 Cl. & Fin. 764.

(c) As there was in *Hague v. Dandeson*, 2 Ex. 741; *Ex parte Plant*, 4 Deac. & Ch. 160. See *infra*, p. 686.

vided, but the debts remain unpaid, the lien which each partner had on the property before its division is gone: and consequently no partner has a right to have the specific things, allotted to any other partner, brought back into the common stock, and applied in liquidation of the partnership liabilities. (d)<sup>1</sup> Upon the same

(d) *Lingen v. Simpson*, 1 Sim. & Stu. 600; and see *re Langmead's Trusts*, 7 DeG. M. & G. 353; the judgment of L. J. Turner.

<sup>1</sup> *Robertson v. Baker*, 11 Fla. 192; *Giddings v. Palmer*, 107 Mass. 269.

The lien of partners upon the partnership property may be lost, either by a sale in good faith to a third person, or by the retirement of one partner from the firm, disposing of his interest to the other partner, or to a third person, with his co-partner's consent, and taking the assumption of his co-partner or of a third person, to discharge all the firm debts. *McGregor v. Ellis*, 2 Disney (Ohio), 286; *Croone v. Bivens*, 2 Head, 339; *West v. Chosten*, 12 Fla. 315; *Griffith v. Buck*, 13 Md. 102, *Andrews v. Mann*, 31 Miss. 322; *Miller v. Estill*, 5 Ohio St. 508; *Vosper v. Kramer*, 31 N. J. Eq. 420; *Ladd v. Griswold*, 4 Gilm. 25; *Parish v. Lewis*, 1 Freem. (Miss.) Ch. 299; *Hapgood v. Cornevell*, 48 Ill. 64; *Smith v. Edwards*, 7 Humph. 106.

See, however, *Morss v. Gleason*, 64 N. Y. 204, where it was held that where a member of a firm transfers his interest therein to a third person, who is received into the firm as a partner in his stead, he thereafter occupies the position simply of surety for the firm debts to the extent that the assets of the firm are sufficient for their payment, and that such assets are held by the new firm, charged with a trust for the payment of the debts of the old firm. *Morss v. Gleason*, 64 N. Y. 204. See, also, *Ketchum v. Durkee*, 1 Hoff. 538.

In *Biddle v. Moore*, 3 Penn. St. 161; A, by the articles for a dissolution of partnership with B, agreed to convey

certain land to B in consideration of B's assuming and paying the debts of the concern, except certain ones specified, which A agreed to pay, on being furnished with notes of third persons to a certain amount. The land was subsequently sold by the sheriff as the property of B: *Held*, that it was competent for A, by an equitable ejectment and conditional verdict, to enforce payment of the purchase-money due himself, the debts of the firm, and those debts which he had agreed to pay on conditions not performed by B.

A promise, by a partner who has purchased his co-partner's entire interest in the firm, that he will pay the firm debts, creates only a personal obligation, and not a lien on the partnership effects, which may still be used by him in payment of his individual debts; and when so applied, the individual creditor taking them without notice of any such promise, stands in the position of a purchaser for a valuable consideration, and holds free of any firm creditor's lien. *Hapgood v. Cornevell*, 48 Ill. 64.

So, a mere covenant by a remaining partner to pay the partnership debts, and to indemnify the outgoing partner against them, raises in his favor no equity to have the firm property applied to the payment of firm debts. Upon such a covenant the outgoing partner can look only to the personal indemnity, and cannot require the application of the partnership property to the payment of the debts. *Cory v. Long*, 2 Sweeny, 491.

When one partner sells out to another the former's interest in the partnership, the question whether the former has a

principle, if two partners consign goods for sale, and direct the consignee to carry the proceeds of the sale equally to their separate accounts without any reserve, and this is done, neither partner has

right after the sale to require the partnership estate to be applied to the partnership debts in his exoneration, depends upon the true meaning of the contract of sale in this respect. Under the contract in this case, the vendor has a right to have all the assets of the partnership so applied. *Shackleford v. Shackleford*, 32 Grat. 481.

But if one partner assign his interest to his co-partner, who binds himself to appropriate the partnership property to the payment of the debts of the firm, the assignee becomes a trustee for the creditors and for the assignor, and will be compelled by a court of equity to discharge his trust. *Sedan v. Williams*, 4 McLean, 51.

Where two partners agreed with an ex-partner that certain notes should be applied to the payment of debts of the partnership of which the three were members, the ex-partner thereby acquires a mere equity to have this agreement performed, which can only be enforced against those who have notice of it. *Commercial Bank of Manchester v. Lewis*, 21 Miss. 226.

A, being a mere nominal partner in a firm, having, in fact, a salary, left it, taking a bond of indemnity against the partnership debts from the other partners, who formed a new partnership, and the new firm assigned a part of the partnership property to a creditor in payment of a debt. A, having paid debts of the old firm, filed his bill in equity to have such assignment set aside as fraudulent as to him: *Held*, that A had no right of preference over any other creditor of the new firm, as he was a simple contract creditor of it, and had his remedy at law like other creditors. *Stone v. Manning*, 2 Scam. 530.

If, on the formation of a new firm by

the addition of another partner, the original stock of goods is credited equally to the two old partners, as their respective shares of the capital stock of the new company; and on the death of one of the original partners, his administrator obtains a decree in chancery, on settlement of the partnership accounts, for the intestate's share of the partnership effects, the surviving original partner has no lien on this fund, for the payment of the original partnership debts. *Coffin v. McCullough*, 30 Ala. 107.

A sale by a commercial partner, on the eve of failing, of all his interest in the partnership to his co-partner, is void, and will be set aside. The partnership property is the common pledge of the partnership creditors, who must be paid out of it before the individual creditors of the members; and if not fully paid, they may pursue either partner, but with no higher rights upon his individual property than his individual creditors have. *Saloy v. Albrecht*, 17 La. Ann. 75.

When a partner purchases his co-partner's entire interest in the firm, takes upon himself all the partnership debts, and afterwards absconds, leaving his individual and the partnership debts unpaid, a court of equity will reinvest the retiring partner with his original rights as partner, giving him a lien on the partnership assets for the payment of partnership debts. *McGown v. Sprague*, 23 Ala. 524.

Where one partner sells out his interest in a firm to a third person and takes securities for the price, they form no part of the firm assets, but are his private property and upon or over which his former co-partner has no lien or control. The latter may file a bill to wind up the concern and have its assets applied to the payment of its debts; but

any lien on the share of the other in those proceeds; although it would have been otherwise if they had remained part of the common property of the two. (*e*)

If a partnership is illegal its members have no lien upon their common property, or upon each other's shares therein (*f*); unless it be by virtue of some agreement not affected by the illegality. No lien if partnership is illegal.

Mere co-owner have no such lien as is enjoyed by \*co-partners. (*g*) But a part owner of a ship \*684 Lien of co-owners. has a right to have the gross freight applied in the first place in payment of the expenses incurred in earning it. (*h*)

in order to do so, he must bring in as defendants the persons owning the interest of the retiring partner, who hold their purchase subject to the partnership accounting. *Glynn v. Phetteplace*, 26 Mich. 383.

A partnership lien is waived by a partner's purchase of his deceased partner's interest at administrator's sale. *Hart v. Clark*, 54 Ala. 490.

The acceptance by one partner of a mortgage made by another partner to secure a balance due from him has been held to vacate and neutralize the partnership lien to that extent. *Robertson v. Baker*, 11 Fla. 192.

See, however, *Hodges v. Hoceman*, 1 Dana, 50, where it was held that the lien of a partner, for a balance on the partnership accounts, is not an incident of the legal title to the effects, but results from the partnership, and is not affected by the mortgages of either partner on his share.

So in *Warren v. Taylor*, 60 Ala. 218, it was held that where the partnership name is used, with the consent of both partners, in borrowing money for the individual accommodation of one, who executes to the other a mortgage on his interest in the partnership property as security, and the latter pays the debt, his lien as a partner upon the partnership property, for the sum so paid, is not dependent on the mortgage

or its registration, and is superior to the lien of a prior unrecorded mortgage, of which he had no notice, but which was recorded before his, and was given for the individual debt of his co-partner. See, also, *Irwin v. Bidwell*, 72 Penn. St. 244.

Though real property, purchased with the effects and used for the purposes of a mercantile firm, may in equity be liable to discharge the balance due from the company to any partner, in preference to the private creditor of any other partner, it is nevertheless competent to the members of such co-partnership to acquire such property jointly as individuals, or to lose the lien aforesaid by acts tending to mislead or deceive creditors or purchasers in this particular; as where the deed neither describes the parties purchasing as merchants and partners, nor states that the purchase was made for the use of the firm, but merely purports a conveyance to them as individuals. *Forde v. Herron*, 4 Munf. 316.

(*e*) See *Holroyd v. Griffiths*, 3 Drew. 423. In *Holderness v. Shakels*, 8 B. & C. 612, the transfer to each partner was subject to the lien which was not therefore lost.

(*f*) See *Ewing v. Osbaldiston*, 2 M. & Cr. 88.

(*g*) *Kay v. Johnston*, 21 Beav. 536.

(*h*) See *Green v. Briggs*, 6 Ha. 395;

By analogy to the doctrine that each member of an ordinary partnership has a lien on the shares of his co-partners for what is due from them as partners to the firm, every company should have a lien on the shares of its members for what may be due from them to the company in respect of such shares. The writer is not aware of any case expressly establishing such a lien in favor of companies generally; but he conceives that its existence cannot be successfully disputed, except where it is inconsistent with an express right of transfer; and he has not met with any decision or dictum inconsistent with this view.

It must, however, be observed that the lien which each partner has on the assets of the partnership, and on the shares of his co-partners, cannot be held to reside in every member of a company, without considerable modification; for its existence is to a great extent inconsistent with the principle that a company is distinct from the individuals composing it, and would destroy many of the advantages resulting from that principle.

Upon these grounds Lord Cottenham, in *Rheam v. Smith*,<sup>1</sup> declined to restrain a creditor of a company from proceeding at law against one of its members; although the creditor was himself a member of the company, and it was insisted that each member had a right to have the accounts of the company taken, and to have its assets applied in payment of its debts.

Again, the ordinary partnership lien is inconsistent with an unrestricted right of transfer. Hence it was held, in *Pinkett v. Wright* (2),<sup>2</sup> that an Irish banking company had no lien on the shares of one of its shareholders for advances made to him by the bank. The Court was

of opinion that with respect to the advances, the shareholder was in the position of an ordinary customer to whom the bank had advanced money, and that what was due from him as a customer did not give any right of lien upon his shares. The question arose between the bank and a transferee of the shares of the customer; and to have allowed the lien would have gone far to destroy the transferability of the shares. The inconsistency of the

*Alexander v. Simms*, 18 Beav. 80, and 5 DeG. M. & G. 57; *Lindsay v. Gibbs*, 22 Beav. 522, and 3 DeG. & J. 690. See, as to the lien of the master on freight, *Bristow v. Whitmore*, 4 DeG. & J. 325, reversing *S. C. Johns*, 96; *Smith v.*

*Plummer*, 1 B. & A. 582.

(1) 2 Ph. 726. See, too, *Hardinge v. Webster*, 1 Dr. & Sm. 101.

(2) 2 Ha. 120, and 12 Cl. & Fin. 764, *sub nomine Murray v. Pinkett*.

lien contended for with the general objects of the company is well put by the Vice-Chancellor Wigram in the case in question.

“It was said that Wright, as a proprietor of shares in the bank, was a partner with the other proprietors of shares—that by the general rules of law which regulate the rights of partners *inter se*, persons claiming an interest in Wright’s shares could only claim such interest, subject to all the equities between Wright and his partners, and that, by such general law without any special contract, the money owing by Wright to the bank was a charge or lien upon his interest in the capital of the concern, which would justify the bank in refusing to transfer his shares until the debt was paid. This argument I have little hesitation in rejecting. In the case of ordinary partnerships a partner can retire and withdraw his capital from the concern only upon a dissolution of a partnership, and it is upon taking the general partnership account between the partners that the right of setting off the debt of each partner in account with the partnership arises. The essential distinction between a partnership like that of the Provincial Bank of Ireland and an ordinary trading partnership, consists in the power and privilege which by the provisions of the deed of settlement are given to a proprietor to retire and withdraw his capital from the concern without the dissolution of the partnership, by transferring his shares to another. This power and privilege constitute very main inducements to the investment of capital in concerns like that of the Provincial Bank of Ireland, and thereby enable the society or partnership to raise a capital and carry on transactions, which it would be impracticable to raise or carry on upon the basis of an ordinary mercantile partnership. The consequences, which, as between a shareholder and the company arise by operation of law alone upon a transfer of shares, cannot therefore be inferred from those which attach upon the dissolution of an ordinary partnership. There is an absence of that analogy between the cases which would support such an inference. The consequences arising upon a transfer of shares must be sought for in the provisions of the deed of settlement, or in some rule of law not repugnant to those provisions. Now, after a perusal of the deed of settlement constituting the Provincial Bank of Ireland, I have come to the conclusion that a right like that claimed by the bank in this case against the plaintiffs would be repugnant to the scope and provisions of the deed of settlement, and that such claim cannot be sustained except by special contract. In the absence of any special contract giving the bank a lien upon the shares of a proprietor in respect of money lent by the bank to such proprietor, I am satisfied the proprietor must be considered and treated by the Court as any stranger who might borrow money of the bank in the course of their ordinary dealings as a bank with a customer.”

\*It need scarcely be observed, that if it is expressly en- \*686  
acted or agreed by the members of a company that the com-  
pany shall have a lien on their shares for all moneys which may be  
due from them to the company on any account what-  
ever, a lien will be created in cases where it would not  
otherwise have existed; and the lien so created is not a mere pas-  
sive right of retainer, but an equitable charge actively enforce-  
Agreements  
for lien.

able (*l*); and so far as it gives a right to prevent a transfer, it is available against all persons claiming under a member indebted to the company. (*m*) Whether it prevents a transfer if the member has given the company a bill for the amount due, and such bill is still running, depends upon the true construction of the enactment or agreement. The currency of the bill will usually be found to suspend the lien (*n*); but a case may arise where it does not produce this effect. (*o*) The language of the clause confirming the lien will, moreover, usually be found to extend it not only to the shares, but to the dividends and other moneys payable in respect of them. (*p*)

As regards banking companies governed by 7 Geo. 4, c. 46, it is expressly enacted that no claim which any member may have in respect of his share shall be set off either at law or in equity against any demand which the company may have against such member, on account of any other matter or thing whatsoever. (*q*)

Unpaid up shares in a company governed by the Companies clauses consolidation act, are not transferable so long as anything is due to the company from their holder for calls either upon them or upon any other shares. (*r*)

Cost-book mining companies are not bound to recognize \*687 \*transfers, unless all calls on the shares transferred, with interest and expenses, have been paid. (*s*)

As regards companies governed by the Companies act, 1862, Table A., it is provided that the company may decline to register any transfer of shares made by a member who is indebted to them. (*t*) The act itself, however, contains nothing on the subject, neither does the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73.

(*l*) *Re Lewis*, 6 Ch. 818.

(*m*) *Ex parte Plant*, 4 D. & C. 163.

(*n*) *Stockton Malleable Iron Co.* 2 Ch. D. 101, which see as to the words "due" and "indebted."

(*o*) *Lond. Birm. and S. Staff. Bank*, 34 Beav. 332; but see the case in the preceding note.

(*p*) *Re Lewis*, 6 Ch. 818; *Hague v. Dandeson*, 2 Ex. 741. It was assumed in this case that a banking firm has a lien on the share of each partner, for

advances made to him as a customer, but see as to this, *ante*, p. 682.

(*q*) 1 & 2 Vict. c. 96, § 4. See *Ex parte Davidson*, 1 Mon. M. D. & DeG. 648; *Ex parte Caldecott*, 2 ib. 368.

(*r*) 8 & 9 Vict. c. 16, § 16; *Hubbersty v. Manchester, Sheffield, etc. Rail. Co.* L. R. 2 Q. B. 59 and 471.

(*s*) 32 & 33 Vict. c. 96, § 14.

(*t*) 25 & 26 Vict. c. 89, Table A., cl. 10. This hardly confers a right to have the shares sold for payment of the debt.

SECTION IV.—OF THE MODE IN WHICH A SHARE IS TAKEN IN EXECUTION FOR THE SEPARATE DEBTS OF ITS OWNER.

1. *In the case of partnerships.*

The nature of a partner's share in partnership property, and the effect of the lien noticed in the preceding sections, are well seen when a separate judgment creditor of a partner seeks to levy execution upon that partner's share in the partnership. Such a creditor has always been at liberty to execute his judgment, not only against his debtor's separate property, but also against the property of any firm in which the debtor may be a partner. This at first sight seems extremely unjust; inasmuch as it looks like taking one man's property for another man's debt; but in truth the creditor gets only what belongs to his debtor, although it must be confessed that executions of the nature in question put the debtor's partners to no small inconvenience.

Execution  
against a part-  
ner for a sep-  
arate debt.

In order to explain the consequences of an execution against the partnership property for a separate debt of one of the partners, it will be convenient to examine the law as it stood before the Judicature acts with reference to

1. The duty of the sheriff.
2. The position of the purchaser from him.
3. The position of the execution debtor

The position of the execution creditor and of his debtor's co-partner will appear in the course of this examination.

The effect of the Judicature acts will then be noticed.

\*1. *Of the duty of the sheriff.*

\*688

There has been considerable doubt as to the proper mode of levying execution against the property of a firm upon a judgment recovered against one of its members only. (u)

1. Of the duty  
of the sheriff

Before the time of Lord Mansfield it seems that the sheriff was in the habit of acting upon the supposition that each partner was entitled to an undivided share of every article belonging to the firm, without reference to the state of the

Sheriff seizes  
the partnership  
property.

partnership accounts: and in executing a *fi. fa.* against a partner for his separate debt, the sheriff *seized the whole* of the partnership effects (or of so many of them as were requisite), and *sold the undivided share* of the judgment debtor therein. (*v*)

The sheriff seized the whole of every chattel which he sold, because he could not otherwise seize the share of the execution debtor. But he did not sell the whole of what he seized, because his authority was limited by the writ to the goods and chattels of the debtor, and an undivided share can be sold, though it cannot alone be seized. As stated by Lord Holt in *Heydon v. Heydon* (*x*) (where there were two partners, against one of whom a judgment had been obtained), “the sheriff must seize all because the moieties are undivided; for if he seize but a moiety and sell that, the other will have a right to a moiety of that moiety: but he must seize the whole and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner. (*y*)

Lord Mansfield endeavored to introduce what at first sight appears to be a more equitable practice. In his time the sheriff seems to have seized and sold the whole of a sufficient portion of the partnership goods (instead of selling only an undivided share thereof), and then an account was directed to be taken of the judgment debtor’s share of the proceeds of the sale, and that share, or a sufficient part of it, was handed over to the execution creditor. (*z*) This, however, was a very imperfect mode of proceeding; for it was impossible to ascertain the share of the debtor partner in the goods seized, without taking all the partnership accounts, and this a court of law had no power to do. Lord Mansfield’s innovation was therefore discontinued (*a*); and it was finally settled, in conformity with the older cases, that the sheriff’s duty was, and it still is, to seize the whole of the partnership effects, or of so much of them as may

Lord Mansfield’s innovation.

Modern rule.

(*v*) See *Heydon v. Heydon*, 1 Salk 392; *Jackey v. Butler*, 2 Ld. Raymond. 871; *Backhurst v. Clinkard*, 1 Show. (K. B.) 169; *Pope v. Haman*, Comb. 217; *Mariott v. Shaw*, Comyn, 277; *Dutton v. Morrison*, 17 Ves. 205; *Re Wait*, 1 Jac. & W. 608.

(*x*) 1 Salk. 392.

(*y*) See, too, *per Tindal*, C. J. in

*Johnson v. Evans*, 7 Man. & Gr. 249, 250.

(*z*) See *Eddie v. Davidson*, Dougl. 650.

(*a*) See *Parker v. Pistor*, 3 Bos. & P. 288; *Chapman v. Koops*, ib. 289; *Morley v. Strombom*, 3 Bos. & P. 254. Lord Eldon greatly disapproved of it, see *Waters v. Taylor*, 2 V. & B. 301.

be requisite, and to sell the undivided share of the debtor partner therein,<sup>1</sup> without reference to the state of the accounts as between him and his co-partners. (b)<sup>2</sup>

<sup>1</sup> See *Phillips v. Cook*, 24 Wend. 389; *Lee v. Bullard*, 3 La. Ann. 462; *United States v. Williams*, 4 McLean, 236. See, also, *Nelson v. Conner*, 3 La. Ann. 456; *Thomas v. Lusk*, 13 id. 277; *Wiles v. Maddox*, 26 Mo. 77; *Morgan v. Watmough*, 5 Whart. 125. See, however, *Jarvis v. Hyer*, 4 Dev. L. 367.

The interest of one partner in the partnership property may be attached, or taken and sold on execution for his separate debt. See *Sitler v. Walker*, 1 Freem. Ch. (Miss.) 77; *Place v. Sweetzer*, 16 Ohio, 142; *James v. Stratton*, 32 Ill. 202; *Newhall v. Buckingham*, 14 id. 405; *White v. Jones*, 38 Ill. 159; *Dow v. Sayward*, 14 N. H. 9; S. C. 12 id. 271; *Marston v. Dewberry*, 21 La. Ann. 518; *Nixon v. Nash*, 12 Ohio St. 647; *Chopin v. Wilson*, 27 La. Ann. 441; *Saunders v. Bartlett*, 12 Heisk. 316; *Wilson v. Strobach*, 59 Ala. 488; *Weaver v. Ashcroft*, 50 Tex. 428; *Peoples' Bank v. Shryock*, 48 Md. 427; and the cases above cited. See, also, *Meyberg v. Steagall*, 51 Tex. 351.

A creditor of an individual partner has a right to sell on execution only that partner's interest in the firm property, that is, what of the partnership property belongs to the debtor partner, after paying the debts due by the firm, and his own debt to the firm. *Merrill v. Rinker*, 1 Baldw. 528; *Lyndon v. Gorham*, 1 Gall. 367; *White v. Dougherty*, Mart. & Y. 309; *McCarty v. Emlen*, 2 Yeates, 190; *Dower v. Stanffer*, 2 N. J.

L. 193; *Knox v. Schepler*, 2 Hill, (S. C.) 595; *Knox v. Summers*, 4 Yeates, 477; *Tappan v. Blaisdell*, 5 N. H. 189; *Pierce v. Jackson*, 6 Mass. 242; *Fish v. Herrick*, 6 id. 271; *Place v. Sweetzer*, 16 Ohio, 142; *Witler v. Richards*, 10 Conn. 37; *Jones v. Thompson*, 12 Cal. 191; *Filley v. Phelps*, 18 Conn. 294; *Gibson v. Stevens*, 7 N. H. 352; *Brewster v. Hammett*, 4 Conn. 540; *Menagh v. Whitwell*, 52 N. Y. 146; *Williams v. Gage*, 49 Miss. 777. See, also, *Peck v. Schultze*, 1 Holmes, 28 and case there cited.

And it makes no difference, whether the company creditor, at the time of giving the credit, knew of the existence of the partnership or not; for the effect of the credit given to increase the funds of the partnership is the same, whether it be a known or a dormant partnership. *Witler v. Richards*, 10 Conn. 37.

The limit of the assessment of value in a proceeding under the sheriff's act, where the property of a firm has been seized under an execution against one of the partners, is the value of the debtor partner's interest. *Ploss v. Thomas*, 6 Mo. App. 157.

In an action against the members of a firm, an attachment was issued against S., one of the partners, which was levied upon the firm property. The firm was at the time insolvent, and soon after made an assignment to defendant. Judgment was thereafter obtained and execution issued in the attachment suit,

(b) *Holmes v. Mentze*, 4 A. & E. 127; S. C. 5 Nev. & Man. 563, and 4 Dowl. Pr. Ca. 300; *Johnson v. Evans*, 7 Man. & Gr. 240. In *Holmes v. Mentze*, it was held that a sheriff, who for the debt of one partner executed a *f. fa.* against the property of the firm, was not enti-

tled to make the execution creditor, and the co-partner of the debtor interplead; but that if the execution creditor denied the partnership he was bound to indemnify the sheriff.

<sup>2</sup> See *Bardwell v. Perry*, 19 Vt. 292.

The sheriff, having seized the property of the firm, proceeds to sell the interest of the judgment debtor (*c*), and to assign the same to the purchaser. The bill of sale recites that the sheriff has entered upon and taken possession of all the

Sale of execution debtor's share.

under which the sheriff sold "all the right, title and interest which" S. had in the property at the time of the levy of the attachment. Plaintiff was the purchaser. In an action brought to determine the title to the property, *held*, that as the firm assets were insufficient to pay its debts, the interest of S. therein was nothing, and plaintiff took nothing by his purchase. (*Van Brunt v. Applegate*, 44 N. Y. 544 distinguished.) *Staats v. Bristow*, 73 N. Y. 265.

Equity will interfere to prevent a separate creditor levying on firm effects from standing in any better position than that of his debtor. *Thompson v. Frist*, 15 Md. 24.

Where an execution against one of two partners, for his individual debt, was levied upon partnership goods, and the goods were sold at a constable's sale, and the other partner replevied the goods from the purchaser: *Held* that the measure of damages against the plaintiff in replevin was only the value of the interest of the debtor partner in the goods at the time of the sale; that is, his share of the surplus after all demands against the firm should be paid. *Sutcliffe v. Dohrman*, 18 Ohio, 181.

Where partnership property is sold under separate executions against the partners individually, the proceeds represent the several interests of the partners and not that of the partnership, and the fund should be distributed accordingly. *Vandike's appeal*, 57 Pa. St. 9. See, also, *Cooper's appeals*, 26 Penn. St. 262.

The interest of a partner who contrib-

utes only time, labor and skill, in the partnership property, may be levied on and sold by execution against him as an individual. *Knight v. Ogden*, 2 Tenn. Ch. 473.

It is not an interest in any particular piece of property, but in the firm assets after the settlement of the firm accounts, that is liable for a partner's separate debts. *Atwood v. Meredith*, 37 Miss. 635.

See, however, *Carillon v. Thomas*, 6 Mo. App. 574.

The specific credits of a partnership cannot be seized under execution against one of the partners, or surviving partner. The entire interest of a partner may be seized and sold; but no specific asset, credit, or property of the partnership is liable to seizure under execution against one of the partners. *Levy v. Cowan*, 27 La. Ann. 556; *Marston v. Dewberry*, 21 id. 518.

A debt due to a partnership is not liable to attachment at the suit of a creditor of one of the partners, where the partnership is a continuing one, and where there has been no adjustment of the partnership affairs. *Peoples' Bank v. Shryock*, 48 Md. 427; *Lyndon v. Gorham*, 1 Gall. 367; *Bulfinch v. Winchenbach*, 3 Allen, 161; *Sweet v. Reed*, 12 R. I. 121.

A was garnished as a debtor of B, who was a member of a firm, and A confessed that he did owe B, but, in fact, the debt was due the firm: *Held*, in an action by the firm to recover this debt, that as the property of the firm could not be attached for the private debts of its members, A's confession and pay-

(*c*) Formerly the sale must have been by auction, but now it may be made by

private contract. See *Ex parte Villars*, 9 Ch. 432.

share and interest of A. B. (the judgment debtor) as partner with one C. D., of and in all the book debts, materials, tools, implements, goods, chattels, effects, and stock in trade used in the said

ment of the debt was no discharge of the partnership debt. *Cook v. Arthur*, 11 Ired. L. 407.

P. and L. made a contract by which L., who owned a patent right, authorized P. to sell the same in certain states of the union, and it was agreed that P. was to sell the same; that out of all property and money received by P., by means of such sales, the expenses thereof should first be paid, and the remainder should be equally divided between P. & L., and that this division should be made as early as reasonably could be, and from time to time, whenever any such money or property should be received. The transaction of the business thus provided for necessitated the incurring of expenses which did not apply solely to any particular sale, but to the whole business together: *Held*, that under this contract the proceeds of the sales previous to a settlement of their expenses, belonged to P. and L. jointly, and no part thereof to either of them severally, and that individual creditors of neither party could by means of the trustee process, attach such party's interest in any of their joint property in the hands of a third person, whether such property was tangible, or was a debt due from such third person to P. & L. *Towne v. Leach*, 32 Vt. 747.

In Maine, however, it is held that the debtor of a firm can be holden as trustee of one of the partners in an action in which that partner is principal defendant, if neither the creditor of the firm nor any other partner interpose. *Thompson v. Lewis*, 34 Me. 167.

In Maine, also, it is held that a creditor of one of the partners of a firm may attach such partner's interest in a specific portion of a stock of goods belonging to the firm, and is not required in

order to render the attachment regular to take the partners interest in the entire stock of goods. *Fogg v. Lawry*, 68 Me. 78. See, also, *Carillon v. Thomas*, 6 Mo. App. 574.

A valid lien as against a debtor who is a member of a partnership, may be acquired by attaching all his interest in the effects of the firm, and summoning the other partners as trustees; and such lien may be preserved by notice to the parties concerned, and such other acts designed to give notoriety to the attachment as the nature of the property will admit, although possession cannot be taken and the property removed, to the exclusion of the other partners. *Treadwell v. Brown*, 43 N. H. 290.

A judgment lien against one of the partners of a firm individually, has been held to constitute a lien on the interest of that partner in the partnership property, which entitles the purchaser of it, when sold, to possession, divested of liens for firm debts not reduced to judgments. *Green v. Ross*, 24 Ga. 613.

Partnership property may be attached for the individual debt of one of the partners, after the dissolution of the partnership, and after a receiver has been appointed by a decree of a court of equity in a sister State, to get in and dispose of the assets. *Schatzill v. Bolton*, 2 McCord, 478.

In Louisiana, however, a creditor of partners in a state of liquidation cannot, for a debt not due by the partnership, seize a partnership asset, nor acquire any rights by seizing the interest therein of the individual partners. *Smith v. McMicken*, 3 La. Ann. 319.

Such a creditor must await the liquidation of the partnership; but he may meanwhile lay hold of his debtors' residuary interest in the partnership gener-

business, which has been valued at £——; and the sheriff then assigns all the share, right and interest of him, the said A. B., of and in all and every the debts, chattels, and effects so seized under

ally, by levying a seizure in the hands of the partnership or its representative charged with its liquidation. *Smith v. McMicken*, *supra*; *Davis v. Carroll*, 11 La. Ann. 705.

It has been held that upon execution against one partner, the sheriff may levy on that partner's undivided interest in goods, and take the goods into his exclusive possession, and that though the firm debts exceed the firm effects. *Andrews v. Keith*, 34 Ala. 722. See, however, *post* 690, 691 note.

A sheriff who has levied upon the interest of one partner on the suit of his separate or individual creditor, may release the levy when the partnership is insolvent, and the sale of the partner's interest would have been unproductive of anything to satisfy the execution. On a motion against the sheriff for his failure to collect the money due on the judgment, it is competent for him to prove the insolvency of the partnership. *Wilson v. Strobach*, 59 Ala. 488.

In Massachusetts, however, if an officer attach and take possession of personal property of a firm on a writ against one partner who has no equitable interest in such property, he is a trespasser. *Cropper v. Coburn*, 2 Curt. 465; and see *post* 691, note; *Warren v. Wallis*, 38 Tex. 235.

To a bill brought under Mass. Gen. Stat. ch. 113, § 2, cl. 11, by a creditor of one member of a firm against all the partners, to reach and apply the amount found due, such member on liquidation, the debtors of the firm cannot be made parties. *Tobey v. McFarlin*, 115 Mass. 98.

A sheriff cannot, upon an execution issued in an attachment suit, brought against the members of a limited partnership, levy upon, and sell, the right,

title, and interest of a special partner, in the goods, chattles, assets, and accounts of the firm. *Harris v. Murray*, 28 N. Y. 574.

Under Ga. Code, § 1919,—making the firm property first liable to pay the firm debts—the undivided interest of a partner therein is not liable to levy and sale, even after dissolution, but must be reached by process of garnishment. *Anderson v. Cheney*, 51 Ga. 372.

Money or property belonging to a partnership may be claimed by the partners individually, as exempt from levy and sale under legal process against them individually. *Howard v. Jones*, 50 Ala. 67.

A partner's wrongful appropriation of the partnership property does not take the same out of the provisions of the Ga. Code, § 1919, exempting a partner's interest in the assets from levy and sale. *Holifield v. White*, 52 Ga. 567.

In Tennessee it is held that partnership property is not exempt in the hands of one member of the firm, who is the head of the family. *Spiro v. Paxton*, 3 B. J. Lea, 75.

The creditors of a firm have the right to follow the firm assets into land bought with the purchase money of other land in which the assets were first invested, and the partner making the investment cannot claim a homestead exemption in such land as against firm creditors. *Chalfont v. Grant*, 3 B. J. Lea, 118.

A judgment against a partner individually is a lien upon real estate held by the firm; subject, however, to the payment of the firm debts, and the equities of his co-partners. *Johnson v. Rogers*, 15 Bankr. Reg. 1.

Land was bought and held by a firm for partnership purposes; and W. one of the partners, gave his individual

and by virtue of the writ of *fi. fa.*, and held by the said A. B. in partnership or joint tenancy with the said C. D., to have and to hold, receive and take, the said share, furniture, debts, goods, chat-

judgment to the vendors for his proportionate share of the purchase money. He afterwards sold and conveyed his interest to the other partners, and they sold and conveyed the whole to a third party. Subsequently, within five years from the date of its entry, a *scire facias* was issued to continue the lien of the judgment against W., and the purchasers from the firm were summoned as terre tenants: *Held*, that the individual interest of W. was real estate, and hence bound in the hands of the terre tenants by the lien of the judgment against him, subject to the superior equitable lien of the partnership debts. *Mead v. Withrow*, 8 Phil. 517.

A joint-stock company, constituted for the purpose of trading in land, is a partnership; and land owned by the company is not subject to judgment and execution in behalf of a separate creditor of a member of the company. *Kramer v. Arthurs*, 7 Pa. St. 165.

The levy of an execution against one partner on a piece of land belonging to the firm, gives the execution purchaser no title, legal or equitable, to the land; the levy should be on the partner's interest in the joint stock, and a sale thereof would give the purchaser a right to an account and division, *Clagett v. Kilbourne*, 1 Black, 346.

Where a partnership creditor obtains judgment against one of the firm, and partnership land is sold under execution on such judgment, though the sheriff's deed should cover the whole property, the purchaser acquires only the interest of the partner who was defendant in the execution. *Price v. Hunt*, 11 Ired. L. 42.

A purchaser under an execution against one partner, in his separate capacity, becomes a tenant in common with the other partners, in an undivided

share of the land which he purchases, and holds it subject to all the rights of the other partners, and can have no claim, but upon the separate interest of the individual partner in the residue which may remain after the partnership debts are paid. *Gilmore v. North American Land Co.* Pet. C. Ct. 460.

A partner who permits the separate creditors of his co-partner to set off lands on execution to satisfy such co-partner's debt, and to recover judgment in ejectment for his possession, without asking, before the levy, for an account of the partnership effects, cannot afterwards disturb the levy on the ground that the land was partnership property. *Clark v. Lyman*, 8 Vt. 290.

The fact that the partnership real estate stands in the name of one of the partners, does not prevent a separate creditor of another partner from attaching his interest therein. *Hill v. Beach*, 12 N. J. Eq. 31.

Real estate purchased and used for partnership purposes, but held in the names of the partners individually, may be subjected in equity to the payment of partnership debts, but cannot be sold under execution at law against the surviving partner as such. The sheriff's deed to the purchaser, at execution sale against such surviving partner, conveys only his undivided interest in the lands. *Caldwell v. Parmer*, 56 Ala. 405.

Individual interests in real estate conveyed to a firm are subjected by attachments to the payments of individual liabilities, although such real estate be conveyed to and held in the firm name, if it is not made to appear that it was purchased for partnership purposes, and appropriated to those purposes, and paid for by partnership funds. *Bank of Louisville v. Hall*, 8 Bush, 672.

tels, and effects thereby bargained and sold, or intended so to be, unto the said E. F. (the purchaser), his heirs, executors, \*690 \*administrators, and assigns, as his and their own proper debts, goods, and chattels. (*d*)

It is to be observed that the sheriff seizes, sells, and assigns; but he has no business to take the goods of the firm out of Rights of the other partners. the possession of the solvent partners(*e*); and if the sheriff sells not the share of the execution debtor, but the goods themselves, he is accountable to the solvent partners for so much

Where real estate was originally purchased by one of two partners, and paid for out of his individual funds, and the only interest of the partnership in the premises is on account of improvements made thereon with the funds of the partnership, the actual interest in the premises of the partner advancing the purchase-money, at least his individual interest therein, is liable to be sold on an execution against him. *Averill v. Loucks*, 6 Barb. 19.

(*d*) See *Habershon v. Blurton*, 1 DeG. & Sm. 121.

(*e*) See *per* Patteson, J., in *Burnell v. Hunt*, 5 Jur. 650.

<sup>1</sup>*Garvin v. Paul*, 47 N. H. 158; *Gibson v. Stevens*, 7 N. H. 352; *Morrison v. Blodgett*, 8 N. H. 238; *Newman v. Bean*, 21 N. H. 93; *Hill v. Wiggin*, 31 N. H. 292. See, however, *Andrews v. Keith*, 34 Ala. 722. See, also, *Phillips v. Cook*, 24 Wend. 389, where it is said that the sheriff may deliver possession of the property sold to the purchaser.

See, also, *Carillon v. Thomas*, 6 Mo. App. 574.

After the levy and previous to the sale of the interest of a member of a firm in the co-partnership goods, the sheriff may hold joint possession with the other members of the firm. *Burrall v. Acker*, 23 Wend. 606; 21 Id. 605.

The power of the sheriff for the purpose of rendering the levy upon the interest of one partner in the co-partnership property effectual to take possession

of the whole property, is merely incidental to the right to reach the debtor's interest, and is to be exercised as far as possible in harmony with, not in hostility to, the rights of the other partners. *Atkins v. Saxton*, 77 N. Y. 195.

Complainant in an action against a sheriff alleged that plaintiff was the owner and entitled to the possession of a certain undivided interest in certain personal property, possession of which had been unlawfully taken, and was unlawfully detained by the defendant, etc.: *Held* sufficient, but that proof of seizure by the defendant of the undivided interest of plaintiff's co-owner would not sustain the action. *Schenck v. Long*, 67 Ind. 579.

A purchaser at the sale upon an execution against one partner, levied upon his interest in partnership property, does not acquire any title to the property entitling him to delivery of it, nor, if it be a debt, entitling him to collect it. The title to the property or the debt still remains in the partnership, and the purchaser acquires only a right to call the partnership to an accounting. *Barrett & McKenzie*, 24 Minn. 20; *Lothrop v. Wightman*, 41 Pa. St. 297; *Deal v. Bogue*, 20 id. 228; *Reinheimer v. Hemingway*, 35 id. 432; *Smith v. Emerson*, 43 Id. 456; *Wilson v. Strobach*, 59 Ala. 488; note (1) *supra*. See, however, *Phillips v. Cook*, *Carillon v. Thomas*, *sup.*

of the proceeds of the sale as is proportional to their share in the partnership. (f)<sup>2</sup>

(f) *Mayhew v. Herrick*, 7 C. B. 229.

<sup>2</sup> In *Walsh v. Adams*, 3 Den. 125, it was held that where a sheriff sells the property of a partnership, as the individual property of one partner, on an execution against such partner individually, he is liable in trover to another partner therefor; and the plaintiff is entitled to recover his undivided share in the property so sold, without regard to the state of the partnership accounts. See, also, *Atkins v. Saxton*, *infra*.

So, in *Spalding v. Black*, 22 Kan. 55, it was held that where an officer with an execution against one member of any partnership, general or limited, levies upon the partnership property, and sells the whole property instead of the execution debtor's interest therein, the remaining partners may treat him as a trespasser *ab initio*, and bring their action against him therefor, and to such action the execution debtor is not a necessary party. *Spalding v. Black*, 22 Kan. 55.

See, however, *White v. Woodward*, 8 B. Mon. 484, where it is said that the only remedy for the other partner is in equity.

Where a partnership had failed, and was in a condition necessarily to be immediately wound up, which the defendant must have known, but nevertheless attached the goods of the partnership, sold them, and applied them to his own debt against one of the partners individually: *Held*, that the defendant was bound, under the circumstances disclosed, to take notice of the rights of a partner who was a creditor living in another town, and that he would be held to account for the value of the goods, notwithstanding the partner did not interfere and prevent the sale. *Miner v. Pierce*, 38 Vt. 610.

It seems that a seizure and levy by a sheriff under an attachment or execution against one person upon the entire property of a firm, as the sole property of the debtor, is not justified by showing that the debtor has an interest in the property as a co-partner. *Atkins v. Saxton*, 77 N. Y. 195.

In an action against a sheriff to recover the possession of certain property, defendant justified under two attachments against B. The property formerly belonged to a firm composed of plaintiff and B. Plaintiff's evidence was to the effect that prior to the seizure the firm was dissolved and the personal property divided between the partners; that B. sold his portion to third persons, and all had been removed save a small portion left by one of the purchaser's in plaintiff's care. Defendant seized all the goods of the late firm in plaintiff's possession as the sole property of B. Defendant conceded the partnership, but controverted the dissolution and division. The court charged that if the jury believed there was a nominal assignment by B. of his interest in the property seized to plaintiff, with intent to defraud B.'s creditors, and with knowledge on plaintiff's part, then the property was liable to the attachments: *Held*, error. Even if a fraud is perpetrated, the whole property does not become liable to seizure upon attachments at the suit of an individual creditor; nothing more than the debtor's interest in the property can in any event be liable. When, therefore, the sheriff exceeds this limit, and instead of levying upon the debtor's interest, levies upon and seizes the property as the sole property of the debtor, he is a trespasser. *Atkins v. Saxton*, *supra*.

2. *Of the position of the purchaser from the sheriff.*

If the purchaser is a stranger unconnected with the firm, he acquires for his own benefit all the judgment debtor's interest in the property comprised in the bill of sale, and becomes, as regards such property, tenant in common with the judgment debtor's co-partners.<sup>3</sup> The next step, therefore, is to adjust the conflicting rights of the purchaser, and these partners. Now it is clear from the nature of the lien which each partner has on the partnership property, that a partner holds a partnership chattel with his co-partner, subject to all the equities which that co-partner has upon it (*g*), and subject therefore to his right to have all the creditors of the firm paid out of the assets of the firm, and consequently, *pro tanto*, out of the chattels seized by the sheriff. (*h*) It is equally clear that in this respect the purchaser from the sheriff is in no better position than the partner whose undivided share has been sold. (*i*)<sup>4</sup> Before the Judicature acts, therefore, a suit in equity became necessary, in order that the partnership accounts might be taken, and the partnership property duly applied. (*k*)<sup>5</sup>

<sup>3</sup>Latham *v.* Simmons, 3 Jones L. 27; United States *v.* Williams, 4 McLean, 236; Gilmore *v.* N. A. Land Co. Pet. C. C. 460, where the thing sold was an undivided share in Land; Williams *v.* Gage, 49 Miss. 777; Knight *v.* Ogden, 2 Tenn. Ch. 473.

If such purchaser sells the goods entire, he is liable in assumpsit to a subsequent trustee of the firm for a moiety of the goods so sold. Latham *v.* Simmons, 3 Jones L. 27.

(*g*) Barker *v.* Goodair, 11 Ves. 85.

(*h*) See the next note.

(*i*) Skipp *v.* Harwood, 2 Swanst. 586; Taylor *v.* Fields, 4 Ves. 396; Young *v.* Keighly, 15 Ves. 557; Dutton *v.* Morrison, 17 Ves. 205-6; *Ex parte* Hamper, ib. 404-5; *Re* Wait, 1 J. & W. 608.

<sup>4</sup>See Renton *v.* Chaplain, 9 N. J. Eq. 62; Tredwell *v.* Roscoe, 3 Dev. L. 50; Menagh *v.* Whitwell, 52 N. Y. 146; People's Bank *v.* Shryock, 48 Md. 427.

(*k*) See Parker *v.* Pistor, 2 Bos. & Pul. 288.

<sup>5</sup>Under the common law, a creditor may seize his debtor's interest in the partnership property, subject to the prior rights of the other partners and partnership creditors; and may, after the seizure and before the sale, sue the other partners to ascertain the amount of the interest seized; or may sell and leave it to the purchaser to ascertain it. Broadnax *v.* Thomason, 1 La. Ann. 384. See, also, Knight *v.* Ogden, 2 Tenn. Ch. 473.

The judgment debtor may elect to have an account taken before the sale, by applying to a court of equity therefor. Hacker *v.* Johnson, 66 Me. 21.

If a sale of partnership property, under a separate execution against one partner, be fraudulent, and there be collusion between the purchaser and the insolvent partner, in order to deprive the other partner of his rights under articles of co-partnership, the court will lend no aid to the purchaser. Renton *v.* Chaplain, 9 N. J. Eq. 62.

The right of the partners of the judgment debtor being of the nature described, and it being incompatible with that right that the partnership property seized by the sheriff should be removed or sold by him, the Court of Chancery would, before the Judicature acts, on a bill filed by the judgment debtor's co-partners against the judgment debtor and his creditor and the sheriff, direct the partnership accounts to be taken, and restrain the sheriff from selling the property and appoint a receiver. (Z)<sup>1</sup>

(Z) See *Bevan v. Lewis*, 1 Sim. 376. As to an injunction against the sheriff, compare *Newell v. Townsend*, 6 Sim. 419, with *Garstin v. Asplin*, 1 Madd. 150, and *Jackson v. Stanhope*, 10 Jur. 676; and see *Story on Partn.* § 264; and as to making the sheriff a party, see Lord Eldon's obs. in *Franklyn v. Thomas*, 3 Mer. 235, and *Hawkshaw v. Parkins*, 2 Swanst. 549.

<sup>1</sup>See *Place v. Sweetzer*, 16 Ohio, 142.

If one of several partners has an interest in the assets of the partnership over and above the claims of his co-partners and those of the creditors of the partnership, there is no reason for the court to interfere by injunction to restrain a sale of his interest in the partnership property, upon execution on a judgment against such partner individually. *Mowbray v. Lawrence*, 13 Abb. Pr. 317; 22 How. Pr. 107. See, also, *Hardy v. Donellan*, 33 Ind. 501.

It has been held that an action will lie by a partner to enjoin an individual judgment creditor of the co-partner of the plaintiff from selling upon execution the interest of the co-partner in the partnership assets, where it is made to appear by the complaint that the co-partner whose interest has been seized, has in fact no interest in the assets, and the plaintiff offers to submit to an accounting to show this to be the case. *Turner v. Smith*, 1 Abb. Pr. N. S. 304.

In *Massachusetts*, a court of equity will not, on a bill of the members of a partnership, decree the return of part-

nership property attached in a suit of a creditor of one of the partners against him, and enjoin the attaching officer from further interfering with the property, unless it appears that it is needed to satisfy the claims of the partnership creditors, or that the partner sued has not an interest in the surplus which may remain after payment of the partnership debts. A bill which does not show this is bad upon demurrer. *Peek v. Schultze*, 1 Holmes, 28

It is held, however, in *Minnesota*, that where an execution in favor of an individual creditor of one of the members of any insolvent partnership is levied upon his interest in certain goods belonging to the firm, by taking possession of such goods, and threatening to sell such interest, an action will not lie at the suit of the other partner or partners for a perpetual injunction restraining any further proceedings under the levy, even though the officer making the levy and the creditor directing it have notice of such insolvency. *Wickham v. Davis*, 24 Minn. 167.

In *Brewster v. Hammett*, 4 Conn. 540, A and B being partners, C brought an action against A for a debt due from him individually, and attached an undivided moiety of the partnership stock, A having no interest therein except as a partner. At this time A was insolvent; the partnership also was insolvent. A and B claiming that the creditors of the partnership had a priority of right to the partnership funds, and that

### 3. *Of the position of the execution debtor.*

With respect to the execution debtor, it is to be observed that, in the first place, the execution operates as a dissolution of the partnership.<sup>(m)</sup><sup>2</sup> In the next place, the assignment by the sheriff to the purchaser transfers to the purchaser whatever the sheriff had power to assign, and did assign, but no more; and as, under a *fi. fa.* the sheriff may not have power to sell everything which, as between the partners, is to be considered partnership property, it by no means follows that the assignment has transferred to the creditor all the judgment debtor's share and interest in the partnership. In a case, therefore, where a stranger purchased from the sheriff the execution debtor's interest, and then assigned it to the other partners, it was held that the execution debtor was still entitled to an account from them; the sale by the sheriff not having divested him of all his interest in the concern.<sup>(n)</sup>

Upon a sale by the sheriff of the interest of one partner, there is nothing to prevent a purchase of that interest by his co-partners. But the co-partners purchasing of the

they ought not to be taken for the payment of A's individual debt, then brought a bill in chancery to restrain proceedings in the action brought by C and for a restoration of the property attached: *Held*, that the plaintiffs were not entitled to the relief sought, as they were not invested with the rights of the partnership creditors; and as the effect of a decree in their favor would be to leave the partnership funds so protected from the claims of the attaching creditors, subject to the disposition of the insolvent partner—a result from which the creditors of the partnership would derive no benefit.

And in *Sitler v. Walker*, 1 Freem. Ch. (Miss.) 77, it was held that equity would not restrain the sale of the interest of one partner on execution for his separate debt until the partnership accounts were taken.

Partnership creditors, whose demands are not due, have no equity to enjoin

separate and individual creditors of a partner from attaching his individual property. *Henderson v. Haddon*, 12 Rich. Eq. 393.

(*m*) *Aspinall v. The Lond. and North-West. Rail. Co.* 11 Ha. 325; *Habershon v. Blurton*, 1 DeG. & Sm. 121; *Skipp v. Harwood*, 2 Swanst. 587.

<sup>2</sup> A levy of an execution upon the interest of an insolvent partner and a sale thereunder operate as a dissolution. *Renton v. Chapman*, 9 N. J. Eq. 62. See *Choppin v. Wilson*, 27 La. Ann. 444; *ante* 230.

A mere attachment or mesne process does not, however, dissolve the partnership. *Arnold v. Brown*, 24 Pick. 38.

The mere levy of an execution neither dissolves the partnership nor authorizes the appointment of a receiver with power to liquidate the partnership affairs. *Choppin v. Wilson*, 27 La. Ann. 444.

(*n*) *Habershon v. Blurton*, 1 DeG. & Sm. 121.

sheriff must act with perfect fairness. If they do anything to conceal the true value of the share, so as to enable themselves to buy it for less than it would otherwise have fetched, the sale \*will not be allowed to stand. In *Perens v. Johnson* (o), \*692 the share of a partner in a leasehold colliery was sold by the sheriff under a *fi. fa.* The sale was by auction. The other partners bought the share; the execution creditor <sup>*Perens v. Johnson.*</sup> was paid off; and a balance was handed over by the sheriff to the execution debtor. It appeared, however, that before the sale took place, it was expected that a valuable seam of coal would be reached; that the solvent partners had removed the gear so as to prevent any one going down the mine; that they had also removed some ironstone recently raised, so as to lead persons visiting the mine to believe that coal was not so nearly within reach as it was; and that a few days after the sale, and after only one day's working, a rich seam of coal was actually discovered. The execution debtor thereupon filed a bill against his late co-partners, praying that the sale might be set aside, on the ground that the purchase from the sheriff was contrary to that good faith which should be observed by one partner towards another; and a decree was made in his favor setting the sale aside upon repayment of the purchase-money, with interest at 5*l.* per cent.

The execution creditor has no title to goods seized under a *fi. fa.* issued by him, unless he purchases them from the sheriff. Consequently where, under a *fi. fa.* issued against <sup>Right of the execution creditor.</sup> one partner for a private debt, the sheriff seized the goods of the firm, which afterwards became bankrupt, and the assignees sold the goods seized, it was held that an action by the execution creditor against the assignees for money had and received to his use, would not lie; first, because *he* had no title to the goods; and secondly, because if he had, his interest in them could not be ascertained without taking the accounts of the partnership. (p)

#### 4. Modifications introduced by the Judicature acts.

The Judicature acts and rules promulgated under them do not unfortunately contain any directions applicable to the subject now

(o) *Perens v. Johnson*, and *Johnson v. Perens*, 3 Sm. & G. 419. See, also, *Smith v. Harrison*, 26 L. J. Ch. 412, V.-

C. W., where a sale by the sheriff was also set aside.

(p) *Garbett v. Veale*, 5 Q. B. 408.

\*693 under consideration. Nor has the new practice under \*them yet been reduced to shape. The writer can only, therefore, offer the following suggestions with reference to their combined effect.

1. The practice must be the same in all divisions of the High Court.

2. The old practice must be adhered to so far as it is consistent with the modern procedure.

3. Some form of procedure must be adopted which shall have the effect of a suit for an account, and an injunction, and a receiver.

4. There appears to be no reason why the sheriff should not proceed to seize and sell the execution debtor's share as before; and there is in strictness no more necessity for him to interplead now than before (*q*); and yet as no order for his withdrawal can be made in his absence, a proceeding by him in the nature of an interpleader summons, bringing all parties interested before the Court, would probably be the most convenient course to adopt.

5. Upon a seizure by the sheriff the partners of the execution debtor should obtain an order dissolving the partnership, directing the sheriff to withdraw, and directing the accounts of the partnership to be taken, and the value of the execution debtor's interest in the property seized by the sheriff to be ascertained, and appointing a receiver.

6. After the accounts have been taken, and the above value ascertained, the receiver should be directed to pay the amount of such value to the purchaser from the sheriff, if any, and the rest of the share of the execution debtor in the assets of the partnership to him. If the share has not been sold the execution creditor must be paid out of, or to the extent of the above value. The receiver can then be discharged.

7. Whether all this can be done without a transfer to the Chancery Division is not clear; but probably it very often may be done; and practically a sale by the sheriff will probably be frequently dispensed with. A sale usually produces great hardship, as the value of the share sold is unknown; and its sale seldom answers any useful purpose except that of getting rid of the sheriff.

Suggested  
alteration  
of the law.

\*694

\*The truth, however, is that the whole of this branch of the law is in a most unsatisfactory condition, and requires to be put on an entirely new footing. The

(*q*) See acc. W. N. 1875, p. 204.

statutory enactments relating to charging orders should be extended to all cases in which the share of a partner is sought to be taken in execution for a separate debt of his own.

## 2. *In the case of companies.*

Shares in public companies are rendered available for the payment of the separate debts of their holders by a very different method from that to which recourse must be had in the case of partnerships, as explained in the preceding pages. There is no interference with the company or its property by the sheriff; but the judgment creditor applies to one of the judges of the superior courts for an order charging the shares of the judgment debtor with payment of the debt for which judgment has been recovered. Such an order has the effect of a charge made by the debtor himself in favor of the creditor (*r*), subject, however, to this qualification, that no proceedings can be taken to have the benefit of the charge created by the order until the expiration of six calendar months from its date (*s*). An order *nisi* may be obtained *ex parte*, and without notice to the debtor; and it restrains the company from permitting a transfer of the shares held by the debtor, or by any person in trust for him, until the order is made absolute or discharged; and if the company permits a transfer of the debtor's shares during the continuance of the order, the company becomes liable to the creditor to the extent of the value of the shares transferred. (*t*)

Execution for  
separate debt of  
shareholder.

Charging  
order.

\*In form, an order *nisi* is, that unless cause be shown to the contrary by the judgment debtor within a given time, the shares in the — company, standing in the name of —, shall be, and shall in the meantime stand, charged with the payment of the amount for which judgment has

Order nisi.

(*r*) Where shares are held by A. in trust for B., an order charging them may be obtained by a creditor of A., *Cragg v. Taylor*, L. R. 1. Ex. 148; but, as in the case supposed, A. has no interest in the shares, the creditor cannot maintain an action against the company if it allows A. to transfer the shares. *Gill v. Continental Union Gas Co.*, L. R. 7 Ex. 332. On the other

hand, B.'s interest may be charged in an order in a proper form, *Cragg v. Taylor*, No. 2, L. R. 2 Ex. 131; but not if his interest is only in the produce of their sale. *Dixon v. Wrench*, L. R. 4 Ex. 154.

(*s*) See, as to this, *Bristed v. Wilkins*, 3 Ha. 235; *Reece v. Taylor*, 5 DeG. & S. 480.

(*t*) 1 & 2 Vict. c. 110, §§ 14 to 16; 3 & 4 Vict. c. 82.

been recovered, and costs and interest thereon, pursuant to the statute 1 & 2 Vict. c. 110. (*x*) The order *nisi* prevents the shares from being transferred or dealt with, but the charge created by the order dates from the time the order is made absolute. (*y*) For the purpose of obtaining the benefit of the order, application must be made to the court for a foreclosure or sale. (*z*)

If the creditor causes the debtor to be arrested before the shares have been applied in satisfaction of the debt, the benefit of the charging order is lost. (*a*)

Effect of arrest-  
ing debtor.

The statute which enables shares to be charged in the manner above explained, applies only to "public companies;" but there is no statutory or other authoritative definition of this phrase; and questions of considerable difficulty may consequently arise with reference to many companies, as to whether they are "public" or not.

What are pub-  
lic companies.

In *Macintyre v. Connell* (*b*), the only case in which the meaning of the expression "public companies" has been as yet much discussed, the Court came to the conclusion, 1, that transferability of shares was not the test of publicity; 2, that the attribute of publicity could not be denied in the case of a company empowered to sue and be sued by a public officer, and required to keep a register of its shareholders and to make official returns of their names and addresses.

*Macintyre v.*  
*Connell.*

Taking this decision as a guide, and having regard to the law relating to companies at the time of the passing of the 1 & 2 Vict. c. 110, the following companies must be considered as public companies within the meaning of that act.

What shares  
may be  
charged under  
1 & 2 Vict. c.  
110.

\*696 \*1. Joint-stock banking companies governed by the 7 Geo. 4, c. 46. (*c*)

(*x*) See *Fowler v. Churchill*, 11 M. & W. 57; *Robinson v. Burbridge*, 9 C. B. 289.

(*y*) See *Warburton v. Hill*, Kay, 470; *Scott v. Lord Hastings*, 4 K. & J. 633; *Watts v. Porter*, 3 E. & B. 743, as to the priorities of creditors. See, also, *ante*, note (*r*).

(*z*) As in *Bristed v. Wilkins*, 3 Ha. 235, and *Macintyre v. Connell*, 1 Sim. N. S. 225, 252.

(*a*) 1 & 2 Vict. c. 110, § 16. But arrest for debt is now only possible in cases excepted by 32 & 33 Vict. c. 62, § 4.

(*b*) 1 Sim. N. S. 225.

(*c*) *Macintyre v. Connell*, 1 Sim. N. S. 225, related to a joint-stock banking company governed by 7 Geo. 4, c. 46, and 7 & 8 Vict. c. 113, and removes the doubts formerly entertained respecting such companies. See *Graham v. Connell*, 19 L. J. Ex. 361.

2. Joint-stock companies governed by the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73. (*d*)

3. Incorporated joint-stock companies generally. Incorporation itself makes a company a public company; for its existence is authorized by public authority, viz., the Crown or the legislature, and is required by the same authority to be publicly recognized.

Unincorporated companies, not being banking companies, governed by the 7 Geo. 4, c. 46, or companies governed by the Letters Patent act, are *prima facie* not public companies. (*e*)

This last conclusion, if correct, is of great importance to mining companies formed on the cost-book principle; for if these companies are not public companies within the As to cost-book companies. meaning of 1 & 2 Vict. c. 110, it follows that their mines and plant may be seized under writs issued against individual shareholders for their separate debts. And this appears to be the case; for although the writer is not aware that the propriety of such a seizure has been actually decided (*f*), he is enabled to state of his own knowledge that if judgment is recovered against a shareholder in a Cornish cost-book mining company for a private debt owing by him, and a *fi. fa.* upon such judgment is delivered for execution to the sheriff of Cornwall, he treats the company as a mere partnership, and seizes its property and sells the share and interest of the judgment debtor therein in the ordinary way. This is not so well known as it deserves to be. (*g*)

\*Whether shares can be attached in the Lord Mayor's 697\* court appears doubtful. (*h*)

In connection with the subject of execution, it should be observed that the Court has power, upon the application of any party interested, by motion or petition, in a summary Attachment of shares. Restraining orders. way, to restrain any public company from permitting the transfer of any stock or shares standing in the name of any person in the books of such company, or from paying any dividend

(*d*) See *Macintyre v. Connell*, 1 Sim. N. S. 225.

(*e*) See the judgment of *Macintyre v. Connell*, 1 Sim. N. S. 225.

(*f*) In *Nichols v. Rosewarne*, 7 W. R. 612, the question whether shares in cost-book mines can be charged under 1 & 2 Vict. c. 110, was mooted but not decided.

(*g*) The writer is enabled to make the above statement as to the practice of the sheriff of Cornwall, by having himself (as trustee) issued execution against a person who was a shareholder in several Cornish cost-book mines.

(*h*) See *Tredinnick v. Oliver*, 5 H. & N. 780.

thereon. (2) An application for such an order may be made *ex parte*, but must be supported by an affidavit showing the title of the applicant, and the necessity for the interference of the Court (k); and unless an action is commenced within a reasonable time after the order is made it will be discharged (l); as it will, also, after action, if no sufficient grounds for the order are shown. (m)

## SECTION V.—OF THE TRANSFER OF SHARES.

### 1. *In ordinary partnerships.*

When persons enter into a contract of partnership, their intention ordinarily is, that a partnership shall exist between themselves and themselves alone. The mutual confidence proposed by each in the other is one of the main elements in the contract, and it is obvious that persons may be willing enough to trust each other, and yet be unwilling to place the same trust in any one else. Hence it is one of the fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who for the time being are members of the firm.<sup>1</sup> If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by them. (n)

Transfer of shares in ordinary partnerships.

(i) 5 Vict. c. 5, § 4.

(k) *Re Field*, 1 Y. & C. C. 1; *East of England Bank*, 6 N. R. 81.

(l) *Re Marquis of Hertford*, 1 Ha. 584.

(m) S. C. 1 Ph. 203.

<sup>1</sup>A partner cannot introduce a new member into the firm without the consent of the other members, nor make them members of another firm. When made acquainted with the facts, the members should dissent, or they will be bound. *Mason v. Connell*, 1 Whart. 381; *Murray v. Bogert*, 14 Johns. 318; *Freligh v. Miller*, 16 La. Ann. 418; *Channel v. Fassitt*, 16 Ohio. 166; *Freeman v. Bloomfield*, 43 Mo. 391; *Bennett v. Snyder*, 76 N. Y. 344.

The assent of each member of a co-partnership is necessary to bind him as

a member of a new firm, but his express assent need not be proved, to bind him; it is sufficient to show that he knew of such new arrangement, and made no objection thereto. *Tabb. v. Gist*, 1 Brock. 33.

Where one buys a stranded vessel, and agrees to give another an interest therein, the latter has no interest he can transfer without the former's consent. It is an agreement to take in a partner, and gives the second party no right to impose an unknown partner on the first. *Taylor v. Penny*, 5 La. Ann. 7.

(n) *Pearce v. Chamberlain*, 2 Ves. S. 33; *Crawford v. Hamilton*, 3 Madd. 254; *Bray v. Fromont*, 6 ib. 5; *Crawshay v. Maule*, 1 Swanst. 495; *Tatam v. Williams*, 3 Ha. 347.

\*Still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of the other members. (o)<sup>1</sup> The assignment, however, is by no means inoperative; on the contrary, it involves several important consequences, more especially as regards the dissolution of the firm and the right of the assignee to an account.

Effect of transfer.  
Effect of assignment.

As regards dissolution, it is remarkable that there should be so little authority to be found. It is generally stated, that if a member of an ordinary partnership transfers his share, he thereby dissolves the partnership; but this proposition requires qualification. The true doctrine, it is submitted, is that if the partnership is at will, the assignment dissolves it (*p*);<sup>2</sup> and if the partnership is not at will, the other members are entitled to treat the assignment as a cause of dissolution. It can hardly be that a partner, who has himself no right to dissolve or to introduce a new partner, can, by assigning his share, confer on the assignee a right to have the accounts of the firm taken, and the affairs thereof wound up, in order that he may obtain the benefit of his assignment.

1. As regards dissolution.

Although a partner cannot, by transferring his share, force a new partner on the other members of the firm without their consent, there is nothing to prevent a partner from assigning or mortgaging his share without consulting his co-partners;<sup>3</sup> and if a partner does assign or mortgage his share, he there-

2. As regards account.

(o) See *Jefferys v. Smith*, 3 Russ. 158.

<sup>1</sup> *Merrick v. Brainard*, 38 Barb. 574. See cases cited on the next page, *ante*.

The purchaser of an interest of one of several partners has no right to interfere personally in the affairs of the partnership, and a refusal of the remaining partners to permit him to do so, will not entitle him to the interference of a court of equity by injunction, or the appointment of a receiver. *McGlensey v. Cox*, 5 Pa. Law J. Rep. 203.

Where one of two partners sells to a third person his interest in the goods owned by the partnership, the purchaser cannot maintain an action to recover his interest in the goods, but must sue for an accounting, and will recover whatever his assignor would have been

entitled to upon a settlement of the partnership accounts; and, until the affairs of the partnership are thus wound up, the partner who did not sell is entitled to the possession of the property. *Miller v. Brigham*, 50 Cal. 615.

(*p*) See *Heath v. Sansom*, 4 B. & Ad. 172.

<sup>2</sup> See *ante*, 230 and note.

<sup>3</sup> One partner may sell his interest in the partnership property to his co-partner; and if the sale be fair, he will take the exclusive title thereto. *Reese v. Bradford*, 13 Ala. 837.

One partner may purchase, on his own account, at a public sale, the interest of his co-partner in real estate, and will hold the purchased property as a stranger might. *Bradbury v. Barnes*, 19 Cal. 120.

by confers upon the assignee or mortgagee a right to payment of what, upon taking the accounts of the partnership, may be due to the assignor or mortgagor. (q)<sup>4</sup> But the assignee or mortgagee ac-

A *bona fide* mortgage, given by a member of a firm to the firm, is valid, and in no sense a mortgage to the grantor himself. *Galway v. Fullerton*, 17 N. J. Eq. 389.

An assignment by a member of a firm of all his property to an assignee, for the benefit of his creditors, will convey not only all his individual property, but his interest in the company property. *Fellows v. Greenleaf*, 43 N. H. 421.

(q) *Glyn v. Hood*, 1 Giff. 328, and 1 DeG. F. & J. 334.

<sup>4</sup>See *Rodriguez v. Heffernan*, 5 John. Ch. 417; *Nicoll v. Mumford*, 4 id. 522; *Miller v. Brigham*, 50 Cal. 615; *Menagh v. Whitwell*, 52 N. Y. 146.

Four persons entered into co-partnership in 1832, in the business of manufacturing cotton cloths, for the term of five years, and, in 1833, the partnership was dissolved, and afterwards, by their deed they assigned to A "all their right and title to all and singular the rights, privileges, and interest secured" to them by the articles of co-partnership. A part of the property taken was the property of the partners, and a part of the partnership stock when the partnership was formed, and the residue was afterwards purchased by the partners with the general partnership funds: *Held*, that all the property passed which, at the time of the transfer, was partnership property, to be held and used by A for the residue of the five years, and that the operation of the assignment was not effected by the dissolution, it being made by all. *Caswell v. Howard*, 16 Pick. 562.

By the terms of a contract dissolving a partnership between A and B in a certain store, the former sold the latter "all the right, title and interest of said A" in said store, with all the notes and

accounts due, the latter assuming the payment of all debts and claims against said firm: *Held*, that the contract raised the presumption that the parties intended a complete settlement of all the partnership affairs; that a balance standing to the credit of the firm in a bank was embraced in the "accounts due the firm," and that there was no latent ambiguity in the contract. *Burress v. Blair*, 61 Mo. 133.

W. bought all the interest of M. in the property of the firm of R. & M., and then formed a partnership with R., agreeing to put in all the property he received from M.: *Held*, that a bank deposit in the name of R. & M., of which both parties were ignorant at the time, became the partnership property of the new firm, *W. & R. Cram v. Union Bank*, 1 Abb. App. Dec. 461.

In an agreement between partners it was agreed that for the purpose of disposing of the joint stock of the firm, "as detailed in" a prior inventory thereof, all the property of the firm excepting certain specified items, and excepting "the book accounts and receivables," should be put up and bid upon by the partners; this was done, and plaintiff became the purchaser. In an action for an accounting it appeared that after the inventory and prior to the bidding, certain chattels of the firm had been sold: *Held*, that the sale did not include said chattels or the money or debts obtained therefor; that the statement as to the inventory was simply by way of reference, and in the nature of a recital or matter of inducement. *Deering v. Metcalf*, 74 N. Y. 501.

A sale by a partner to his co-partner of all his interest in the property, effects, claims, assets and debts of a firm, does not pass to the purchaser an account

quires no other right than this (*r*); and he takes subject to the

standing upon the books of the firm against the partner making the sale, nor, as it has been held, the seller's interest in the capital originally contributed by him to the firm. *Coffing v. Taylor*, 16 Ill. 457. See, also, *Hasselman v. Douglass*, 52 Ind. 252; *Owen v. Hetherington*, 66 Ind. 365.

In *Owen v. Hetherington*, *supra*, in a suit upon a promissory note, the defendant answered that himself, B and C were partners; that B and defendant bought out C's interest in the concern, each to pay one-half of the amount agreed upon; that the note in suit was executed by defendant to C in discharge of his half; that when C retired from the firm he was indebted to it in a certain sum, on his individual account, which indebtedness C had fraudulently concealed from the defendant; that defendant subsequently bought out B, and became thereby the owner of the entire claim against C, and asked that such claim be allowed as a set-off against the note: *Held*, that such claim did not constitute a set-off. When a partner sells his "interest in the concern," it must be presumed that he sells only his legal interest in the firm; and it cannot be assumed, in the absence of any stipulation to that effect, that such partner sold or intended to sell his indebtedness to the firm: *Held*, also, that it would be assumed that C's indebtedness to the firm appeared upon its books, and that such books were open to the examination of the defendant, and his alleged ignorance of the existence of such indebtedness was the result of his own inexcusable negligence.

But where by the articles of partnership it was provided that the accounts of each partner to the firm "shall stand due to the concern in the same manner as any other account due by a party un-

connected with the business." Upon the dissolution of the firm, under the written terms thereof, one of the partners "agreed to purchase all right and interest of the other partner in the stock, cash, notes, book-accounts, and everything connected with the firm:" *Held*, that the account of the firm against the partner selling out was cancelled and extinguished in the agreement of dissolution and purchase. *Murdock v. Mehlhop*, 26 Iowa, 213.

So, where one partner, having a large pecuniary interest in the firm, but being individually a debtor thereto, for a certain amount, as appeared by entries on their books, sold and conveyed to the other partner, "all his right, title, and interest in and to all the property and estate, real, personal, and mixed, belonging to, or which of right ought to belong to, said firm:" *Held*, that such conveyance transferred to the other partner only his interest in the concern, which remained after deducting such indebtedness, and that the amount so charged to him individually could not thereafter be collected of him. *Beckley v. Munson*, 22 Conn. 299; *S. P. Finlay v. Fay*, 17 Hun, 67.

Where one of two partners sold out to the other, the purchaser taking all the assets, and assuming the payment of all the liabilities; and where in proceedings between the two, under a submission to arbitrators, the arbitrators found that in the keeping of the books of the firm there had been mistakes, and that the vendor had received credits and cash with which he was not charged, amounting to the sum of \$1900—among which was the following item: "For credits entered, which he is not entitled to, \$1431.84,"—which sum was awarded to the vendee of the partnership interest; and where it was claimed that

rights of the other partners;<sup>5</sup> and will be affected by equities aris-

the vendee was entitled to recover for only one-half of the said sum of \$1431.84: *Held*, that the vendee was substituted to all the rights of the partnership, and whatever either was owing to the firm belonged to him. *Tomlinson v. Hammond*, 8 Iowa, 40.

A partnership was dissolved by articles of dissolution, dated 9th of February, 1839, by which the complainants, were to become possessed of all the stock, debts and assets of the firm, and pay to defendant a certain sum, and these conditions being complied with, the parties were mutually to release all claims against each other. An account was found on the books charging defendant with \$2100 for various items, balanced by an entry of credit for that sum "for expenses" dated the 1st of February, 1839, upon a bill attacking this entry as unauthorized by the terms of the partnership, and fraudulently made pending the negotiation for a dissolution: *Held*, 1. If the defendant had stood charged on the books with the \$2100 at the time the terms of the dissolution were agreed upon, the settlement would have released the indebtedness. 2. But if the terms of dissolution were settled on the

supposition that defendant's account had been properly balanced when in fact the credits had been improperly and fraudulently entered, the complainants were entitled to recover the amount of the debit in defendant's account. 3. In the absence of all proof on the subject it must be assumed, that complainants dealt with defendant under the belief that the books had been fairly and correctly kept, and the credit being proved improper, they were entitled to relief against it. *Trump v. Baltzell*, 3 Md. 295.

Where a partner sells his interest in his firm, including the stock and excepting the accounts and indebtedness due it, to his co-partners, the sale covers amounts which the vendees have failed to pay in as partners to make their respective shares of the capital stock equal to the capital paid in by him, as well as their liability for moneys withdrawn from the firm by them. *Flynn v. Fish*, 7 Lans. 117.

Where certain persons by a writing signed by them, formed an association for publishing a daily and weekly newspaper and therein and thereby agreed that said newspaper, and the good will thereof, and all the other goods, etc, of

<sup>5</sup> Where the interest of one partner in the partnership property passes to another person, it is immaterial whether that transfer be effected by a sale by the partner himself for a valuable consideration, by a sale of his interest on execution, by his death and the succession of his executor or administrator, or by assignment under the bankrupt or insolvent laws. In all these cases the party coming into the right of the partner, comes into nothing more than an interest in the partnership which cannot be tangible, made available, or delivered, except under an account between the partner and the partnership; and it is

an item in the account that enough must be left for the partnership debts. *Baker's Appeal*, 21 Pa. St. 76: *Fourth Nat'l Bank v. Carrollton Railroad*, 11 Wall. 624; *Mords v. Gleason*, 64 N. Y. 204; *Miller v. Brigham*, 50 Cal. 615.

Where real estate held by the members of a partnership as a partnership property is mortgaged by one of the partners to secure his individual debt, the mortgagee only acquires a lien upon what may be the share of the mortgagor after settlement of the partnership accounts and the payment of all partnership debts. *Conant v. Frary*, 49 Ind. 530.

ing between the assignor and his co-partners subsequently to the

the association "as they shall from time to time exist, shall be divided into, and shall always consist of 100 equal shares to be called capital stock;" and in what proportions such stock should belong to them in severalty; and thereby by the 6th article thereof also agreed that each party should have the right to sell any of his said stock, but before doing so, should offer the same to the association, and give it the refusal thereof for 10 days; and that no "purchaser shall acquire any interest whatever in the profits of said papers, till he shall receive a certificate or scrip for his said shares, signed by all the parties hereto, and duly registered in a book to be kept for that purpose," which scrip shall certify that the holder of it "is entitled to participate, in proportion to his shares, only in that portion of the profits which may be assigned to the party selling to such purchaser, and shall not be entitled to any voice or agency whatever in the conduct, control, management or affairs of said company, or of said newspapers:" *Held*, 1. That the plaintiff who purchased 30 shares of the stock from a prior and registered purchaser thereof, was, as between him and his vendor, the owner thereof, and as such equitably entitled to any dividends of profits ascertained and declared while he was such owner, and credited on the books of the association to such stock as its just proportion of such ascertained profits, although such stock was so purchased by the plaintiff without a previous offer of it by his vendor to the association or to either of his associates.

2. A sale and assignment by the plaintiff after such a dividend of profits, of the said "30 shares of capital stock," "and all future benefits and dividends thereof," with full authority, as the attorney of the plaintiff and of his vendor, to sell for them "all or any part of said stock" did not pass to the plaintiff's

vendee any right to the dividend so previously declared and credited to the said 30 shares.

3. A written notice signed by one of the associates and served (on all persons interested in the capital stock) after such a dividend of profits had been made, declaring the association dissolved; and the institution by him of a suit to obtain a judgment declaring it to be dissolved, &c., operated as a dissolution of the association, and made plaintiff's legal title to the profits so allotted and credited to his 30 shares perfect and absolute, and completed his right to sue the associates and recover from them such ascertained and declared profits, unembarrassed by any of the conditions and provisions contained in the 6th article of association.

4. But there would be deducted from such declared profits 3-10 of a debt owing by the association when the dividend was declared and subsequently paid by it, but not then considered, because its amount was not then known or capable of being ascertained. *Harper v. Raymond*, 3 Duer. 29.

A and B, partners in trade, made a written agreement whereby the former, in consideration of a certain sum of money to be paid him, and of a certain amount of goods to be withdrawn by him from the stock of the firm, and of the assumption by the latter of all contracts and debts of the firm, sold and transferred to B all the interest of A in the assets of the firm, including money on hand, notes, accounts, stock, machinery and material; the instrument reciting that the object and purport of the contract was the withdrawal of A from the firm, and the release of A by B "from any and all liabilities on account thereof," and that if B should fully perform the agreement, and release A in accordance with the provisions of the contract, the sale should be

assignment. (s) Even if the assignee gives notice of the assignment, he cannot (if the partnership is for a term) acquire a right

valid in law, else void and of no effect: *Held*, in an action by A against B on said contract, to recover said sum of money as stipulated therein, that A was released from all liability on account of any claim against him or debt due from him in favor of said firm, as well as released from, and secured against any liability of the firm to any other person. *Headley v. Shelton*, 51 Ind. 388.

Where one partner purchases of his co-partner his interest in the partnership property, under a mistake as to the true condition of the partnership accounts, but without fraud in the partner selling, there is no legal consideration for a promise of the latter to make up the amount of the mistake. *Eakin v. Fenton*, 15 Ind. 59.

One partner sold to his co-partner his interest in the partnership effects, and afterwards it was discovered that the inventory and estimate of the effects which the parties had before them at the time of the sale was erroneous, and that the effects were in fact less than appeared from the inventory. The sum paid for the selling partner's interest was, however, considerably less than his share of the amount of the inventory: *Held*, that, while the sale remained in force, an action could not be maintained to recover the difference between the actual amount of the effects and the amount stated in the inventory. *Wood v. Johnson*, 13 Vt. 191.

One of two co-partners, without the knowledge of the other, mortgaged an undivided half of partnership property to secure his private debt. A third party bought the property, promising to pay the mortgagee one-half its value; but being garnished by a firm creditor, he was obliged to pay over the entire value: *Held*, that his promise to pay the mortgagee could not be enforced, the

consideration having failed. *Sauntry v. Dunlap*, 12 Wis. 364.

A *bond fide* transfer of an interest in a partnership may be made without writings or vouchers. *Re Great Western Tel. Co.* 5 Biss. 363.

A notice to one partner in possession of the partnership property, of the purchase of another partner's interest, is a sufficient delivery to constitute a valid sale. *Whigham's Appeal*, 63 Pa. St. 194.

A partner sold his interest, which was one-half, in the business to his co-partners for a given sum; providing further that when the indebtedness of the firm was ascertained, if it did not amount to over \$9,000, they were to execute to him their note for \$1,500; or if the debts of said firm should amount to over \$9,000, then the said note to be proportionately less according to the increase in the amount of said indebtedness. It being ascertained that the indebtedness was in excess of \$9,000: *Held*, that the excess should reduce the amount of the note in the one-half amount of such excess. *Murchison v. Warren*, 50 Tex. 27.

One of the partners in the business of brewers executed an agreement for the sale of "his whole interest in the brewery at," etc., "consisting of stock on hand, personal property, real estate," etc., describing certain town lots, "for the sum of," etc.: *Held*, that this agreement, taken according to its terms, did not dispose of moneys on hand or on deposit belonging to the partnership, or of bills receivable or accounts in favor of the firm. *Garnier v. Gebhard*, 33 Ind. 225.

(s) See *Cavander v. Bulteel*, 9 Ch. 78; *Lindsay v. Gibbs*, 3 DeG. & J. 690; *Guion v. Trask*, 1 DeG. F. & J. 379, *per* Turner, L. J.

to the assignor's share as it stands \*at the time of the assignment or notice, discharged from subsequently arising claims of the other partners. (t)<sup>1</sup> The assignment cannot deprive them of their right to continue the partnership, and consequently to bring subsequent dealings and transactions into account. Whether an assignee of a share in a partnership can compel the other partners to come to an account with him is apparently open to some doubt, although there are instances in which suits with that object have been sustained (u), yet the analogy furnished by sub-partnerships leads to the inference that the assignee must, to use Lord Eldon's language, be satisfied with the share of the profits arising and given to the assignor. (x)

If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement. (y)<sup>2</sup> Persons

Transfer allowed by agreement.

(t) See *Cavander v. Bulteel*, 9 Ch. 78; *Kelly v. Hutton*, 3 Ch. 703; *Redmayne v. Forster*, 2 Eq. 467.

<sup>1</sup> See, however, *Mosely v. Garrett*, 1 J. J. Marsh. 212, where it was held that if a partner mortgage his interest in partnership property, the other partner cannot apply it in discharge of the firm debts.

Where the interest of one of the partners, in the property of a partnership, is assigned by him as security for his individual debts, and such assignee permits the business to go on in its ordinary course, such security becomes subject to the fluctuations of the business, and upon the subsequent dissolution is only entitled to what remains to such partner after the payment of the debts of the firm. *Bank v. Fowle*, 4 Jones Eq. 8.

(u) See *Glyn v. Hood and Kelly v. Hutton*, *ubi supra*. But *Kelley v. Hutton* appears to have been a case of co-ownership in the newspaper and a partnership in its profits.

(x) See *ante* p. 54; and *Brown v. De Tastet*, Jac. 284, where the bill was dismissed against the other partners.

(y) *Lovegrove v. Nelson*, 3 M. & K. 20.

<sup>2</sup> It was agreed, by articles of co-partnership, that any partner might transfer his share by a written certificate, which, when lodged with the clerk, should give the assignee all the privileges, and subject him to all the liabilities, of an original partner: *Held*, that such certificate was not material to a sale. *Alvord v. Smith*, 5 Pick. 232.

The members of a partnership received from their treasurer certificates of stock, containing the provision that no shares should be transferred without consent of the treasurer and directors. A share was assigned to the plaintiff without such consent, and he brought a bill to compel the company to account, alleging himself to be a partner: *Held*, that he was not a partner, and that the bill must be dismissed. *Kingman v. Spurr*, 7 Pick. 235.

Relief in equity may be had by A against B and C, for non-performance of an agreement in writing by which A, with B's consent, assigned to C all A's share in a partnership between A and B, and B and C covenanted to assume the

who enter into such an agreement consent prospectively and once for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission. Such an agreement as this is the basis of every partnership the shares in which are transferable from one person to the other. Those who form such partnerships, and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions. (z)

As observed in *Lovegrove v. Nelson* (a) "to make a person a partner with two others their consent must clearly be had, but there is no particular mode or time required for giving that consent; and if three enter into partnership by a contract which provides that on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear 700\* \*that this would be a valid contract which the Court must perform, and that the new partner would come in as entirely by the consent of the other two as if they had adopted him by name.

Where a partner has an unconditional right to transfer his share, he may transfer it to a pauper, and thus get rid of all liability as between himself and his co-partners in respect of transactions subsequent to the transfer and notice thereof given to them. (b) But even in this case the

Effect of transfer where there is a right to assign.

debts of that firm, and A and B agreed with C that such debts should not exceed a certain amount. *Scovill v. Kinsley*, 13 Gray, 5.

The articles of a joint-stock company provided that a partner wishing to dispose of his interest should first offer his stock to the company, and second, pay up so much of it as should have been called for, after which he might absolutely transfer the stock on the company books and the company were bound to receive his assignee and look to him for all subsequent liabilities. Certain partners assigned their stock but did not transfer it in the manner prescribed by the articles. Their assignees were, however, received and treated as partners

by the other members, who ceased to regard the assignors as partners. In an action, more than four years later, to compel the assignors to share a company loss: *Held*, that they were not liable and that the stock was assigned so as to discharge the assignors from liability for the debts of the company, although the mode prescribed by the articles was not pursued, the company having recognized the assignees as partners, and having ceased to regard the assignors as such. *Wells v. Wilson*, 3 Ohio, 425.

(z) See *Fox v. Clifton*, 9 Bing. 119.

(a) 3 M. & K. 1

(b) *Jefferys v. Smith*, 3 Russ. 158.

transfer alone does not render the transferee a member of the partnership, and liable as between himself and the other members to any of the debts of the firm. (c) In order to render him a partner with the other members, they must acknowledge him to be a partner, or permit him to act as such. (d)

As an ordinary partnership is not distinguishable from the persons composing it, and as every change amongst those persons creates a new partnership, it follows that every time a partner transfers his share to a non-partner the continuity of the firm is broken.<sup>1</sup> In this respect such companies as are not mere partnerships on a large scale differ from ordinary firms, their continuance not being interrupted by changes amongst their members. (e)

An apparent exception to the rule that a share in a partnership cannot be transferred without the consent of all the partners, exists in the case of mining partnerships. Mines are a peculiar species of property, and are in some respects governed by the doctrines of real property law, and in others by the doctrines which regulate trading concerns. Regarding them as real property, and their owners as joint tenants or tenants in common, each partner is held to be at liberty to dispose of his interest in the land without consulting his co-owners; and a transfer of this interest confers upon the transferee all the rights of a part-owner, including a right to an account against the other owners. (f) But even here if the persons originally interested in the mine are not only \*part-owners but also partners, a transferee of the share of \*701 one of them, although he would become a part-owner with the others, would not become a partner with them in the proper sense of the word, unless by agreement express or tacit. (g)

Similar observations apply to transfers of shares in ships. Ships.

(c) *Jefferys v. Smith*, 3 Russ. 158.

(d) *Ibid.*

<sup>1</sup>Where one partner sells out to another, and the remaining ones continue the business, it will be presumed, in the absence of proof to the contrary, that as between themselves the partnership continues, with only a change in the

proportions of their interests. *Frederick v. Cooper*, 3 Iowa, 171.

(e) See *Mayhew's case*, 5 DeG. M. & G. 837.

(f) See *Bentley v. Bates*, 4 Y. & C. 182; *Redmayne v. Forster*, 2 Eq. 467.

(g) As in *Jefferys v. Smith*, 3 Russ. 158; *Crawshay v. Maule*, 1 Swanst. 518.

## 2. *Transfer of shares in companies.*

One of the most important distinctions between partnerships and companies is the comparatively unlimited right of members of the latter to transfer their shares. (*h*) In what are called scrip companies this right is wholly unlimited; the right to the shares passing by the delivery of the scrip certificate. (*i*) In other companies, also, the right to transfer is frequently unfettered.

Whether a share in a company is transferable at the will of its owner for the time being, or whether its transfer requires the consent of the other shareholders, or of the directors of the company, depends upon the constitution of each company.

Speaking generally, if shares are transferable, and no restriction on the right to transfer them is imposed by the regulations of the company, or by the statute or charter by which it is governed, the right to transfer is absolute, and the directors cannot lawfully prevent a transfer, even if they are *bonâ fide* of opinion that it is for the interest of the company that they should do so. (*k*) It follows from this, that where no restriction on the right to transfer exists, a transfer to a pauper, in order to escape from liability, is valid, and cannot be prevented. (*l*) This is certainly going very far; and in cost-book mining companies the legislature has thought fit to interfere, by declaring such transfers fraudulent and void. (*m*)

But notwithstanding the length to which the courts have gone in holding the right to transfer to be free from all implied restriction, a transfer which is fraudulent in the sense of not being a real transfer out and out, or a transfer made for a fraudulent purpose, can be lawfully objected to by the directors. (*n*) But a

(*h*) See *ante*, p. 5.

(*i*) See *Ex parte* Barclay, 26 Beav. 177; *Ex parte* Grisewood, and *Ex parte* DePass, 4 DeG. & J. 544.

(*k*) Stranton Iron, &c. Co. 16 Eq. 559; Weston's case, 4 Ch. 20, reversing 6 Eq. 246. Compare *Ex parte* Parker. 2 Ch. 685; Moffatt v. Farquhar, 7 Ch. D. 591.

(*l*) *Ib.* and see Jefferys v. Smith, 3 Russ. 158, and *infra*, book iv. under the head Contributories.

(*m*) 32 & 33 Vict. c. 19, § 35.

(*n*) This is admitted in Weston's case, 4 Ch. 20. See further under the head Contributories in book iv.

transfer to avoid liability or to multiply votes is held not to be fraudulent. (*o*)

Where, by the constitution of a company certain definite restrictions are placed on the right to transfer its shares, the directors have no implied authority to impose any <sup>Consent requisite.</sup> other restrictions on the exercise of that right (*p*), *e.g.*, if the only restriction is that no calls shall be in arrear, the directors cannot refuse to permit a transfer, if all calls made have been paid. So, again, a right to object to a transferee does not entitle them to object to a transfer to an unobjectionable person, although made for a purpose the directors may disapprove, *e.g.*, to multiply votes. (*q*) Moreover, where, as frequently happens, the restriction is that the directors shall consent to the transfer, their consent is regarded so much as a mere matter of form, that the necessity for it does not practically affect the marketable value of the shares. Nor can directors withhold their consent to a transfer without good reason; for the power of assenting or dissenting to a transfer is reposed in them as trustees, and they must exercise that power accordingly, and not capriciously. (*r*) At the same time, if their consent to a transfer is necessary, and in refusing their consent to a transfer, they act *bonâ fide*, with a view to the protection of the interests of the company, the exercise of their discretion will not be interfered with (*s*); and, in such \*a case, it is competent for them, if \*703 the company is in embarrassed circumstances, to resolve not to allow any transfers at all. (*t*) A director may consent to a transfer of his own shares. (*u*)

A consent to a transfer given and acted upon is not invalid on the

(*o*) See the last four notes.

(*p*) This follows from Weston's case, *ubi supra*. See, also, Chappell's case, 6 Ch. 902; Gilbert's case, 5 Ch. 559, and the next note.

(*q*) *Pender v. Lushington*, 6 Ch. D. 70; *Stranton Iron Co.* 16 Eq. 559.

(*r*) In *Ex parte Penney*, 8 Ch. 446, it was held that they need give no reasons for their refusal; but that whether they give reasons or not, the Court will interfere if it is proved that they are not acting honestly in the discharge of their duty. See *ib.* and *Poole v. Middleton*,

29 Beav. 646; *Robinson v. Chartered Bank*, 1 Eq. 32; *Pinkett v. Wright*, 2 Ha. 120.

(*s*) *Taft v. Harrison*, 10 Ha. 489; *R. v. Liverpool and Manchester Rail. Co.* 21 L. J. Q. B. 284; and see *Birmingham v. Sheridan*, 33 Beav. 660. But compare *Stranton Iron Co.* 16 Eq. 559, *ante*, note (*q*).

(*t*) *Shepherd's case*, 2 Eq. 564, and 2 Ch. 16.

(*u*) *Bush's case*, 6 Ch. 246, and see *Gilbert's case*, 5 Ch. 558.

Informal consent. ground that it has been given informally (*x*): but a consent fraudulently obtained can be treated by the company as invalid. (*y*)

In most companies payment of calls is a condition precedent to the exercise of a right of transferring shares. (*z*) A call must be actually made before its non-payment can justify a refusal to permit a transfer. (*a*) If calls are due on some only of the shares held by a shareholder he cannot be prevented from transferring other shares on which no arrears are due, unless the statutory or other regulations of the company clearly go to that extent. (*b*) The right, however, to prevent a transfer of shares on which calls are due may be waived, *e.g.*, by registering the transfer (*c*); and if waived a transfer of them cannot be afterwards impeached. (*d*)

Whether upon the sale of shares it is the business of the buyer or of the seller to procure the consent of the directors to a transfer will be examined hereafter. (*e*)

Shares in companies are not all legally transferable in the same way: some are transferable by deed only, some by writing not under seal, some apparently by parol. The mode in which the shares of a given company are transferable, depends on the constitution of the company, and on the statute, if any, by which it is governed (*f*); but acceptance in some manner of the transfer by the transferee is essential in all cases. (*g*)

Shares in Companies governed by the Companies clauses consolidation act, are transferable by deed only; and a form of transfer is given by the act. (*h*)

(*x*) *Bargate v. Shortridge*, 5 H. L. C. 297; *Taylor v. Hughes*, 2 Jo. & Lat. 24. See on this subject, *ante*, pp. 137, 138.

<sup>1</sup> See *ante*, 699, note (2).

(*y*) See *Payne's case*, 9 Eq. 223; *Kintrea's case*, 5 Ch. 95, and others of that class.

(*z*) See *ante*, p. 686.

(*a*) *R. v. Inns of Court Hotel Co.* 2 N. R. 397. Compare *Gilbert's case*, 5 Ch. 559.

(*b*) *Hubbersty v. Manchester Rail.* Co. L. R. 2 Q. B. 59 and 471, decided upon the 8 & 9 Vict. c. 16, § 16.

(*c*) *Ex parte Littledale*, 9 Ch. 257, and the case in the next note.

(*d*) *Ibid.* and *Orpen's case*, 9 Jur. N.

S. 615.

(*e*) See *Stray v. Russell*, 1 E. & E. 888; and compare *Wilkinson v. Lloyd*, 7 Q. B. 27, post, p. 712.

(*f*) In *Ex parte Sargent*, 17 Eq. 273, a deed was held not necessary, although the practice was to have one. The articles only required an instrument in writing.

(*g*) See *Cartmell's case*, 9 Ch. 691.

(*h*) 8 & 9 Vict. c. 16, § 14. Railway stock belonging to a lunatic may be transferred without a deed, under an order obtained in lunacy. See 16 & 17 Vict. c. 70, §§ 141, 142, and *Re Ives*, 9 Jur. N. S. 611.

The companies act, 1862, declares that shares in companies formed and registered under that act shall be capable of being transferred in manner provided by the regulations of the company (§ 22). (*i*) Table A. contains a form of transfer, and requires it to be executed both by the transferrer and the transferee (see Nos. 8 and 9). Whether executed means sealed and delivered is, however, left in obscurity. (*k*) Shares in these companies cannot, however, be made transferable by mere delivery (*l*), except under the provisions of the Companies act, 1867, which only applies to fully paid-up shares in limited companies. (*m*)

Executors or administrators of members of companies governed by the act and table in question may, at their option, either register themselves as members (Table A., No. 13), or transfer the shares which have devolved upon them, without becoming members themselves (Nos. 14 to 16, and see § 24 of the act). The same observation applies to trustees of bankrupt members, and to persons marrying female members (see Table A., Nos. 13—16.)

The transfer of shares in other companies is not regulated by any general act of Parliament now in force. (*n*) Shares in cost-book mining companies, although usually transferred by some written document, appear to be transferable by parol only. (*o*) \*Shares in what are called scrip companies are apparently transferable by the delivery of the scrip certificate. (*p*)

Companies formed under the repealed acts of 1856–8, may cause their shares to be transferred in manner in use before November, 1862, or in such other manner as such companies may direct. (*p*)

The forms of transfer given by the various acts are short, and are framed with a view to convenient registration; and although shares may be transferred by instruments in

Forms of  
transfer.

(*i*) The repealed acts 7 & 8 Vict. c. 110, § 54, and c. 113, § 23, both required transfers to be by deed. See as to scrip, etc. transferable to bearer, *infra*.

(*k*) *Ex parte* Sargent, 17 Eq. 273, tends to show that a deed is not necessary.

(*l*) See *General Co. for the Promotion of Land Credit*, 5 Ch. 363; *Reuss v. Bos*, L. R. 5 H. L. 176.

(*m*) See 30 & 31 Vict. c. 131, § 27 *et seq.*

(*n*) *Ante*, p. 149. As to agreements for the transfer of shares in banking companies, see 30 Vict. c. 29, noticed *infra*.

(*o*) *Ex parte* Barclay, 26 Beav. 177; *Grisewood*, 7 DeG. & J. 544; *DePass*, *ib.*

(*p*) 25 & 26 Vict. c. 89, § 178.

other forms, still, if they are complicated, and differ substantially from those prescribed, the company need not register them. (*q*)

Shares standing in the names of trustees or lunatics may be transferred in proper cases under an order of the Chancery Division, or an order in lunacy as the case may be. (*r*)

Shares of  
trustees and  
lunatics.

Shares are held not to be goods, wares, or merchandise within the clause in the Stamp act, exempting contracts for the sale of goods from stamp duty (*s*); and written agreements for their sale must therefore be stamped. (*t*) Shares, moreover, are property within the meaning of the Stamp acts; and instruments of transfer must therefore have the true consideration for the transfer expressed upon them, and be stamped accordingly. (*u*) Several shareholders, however, may join in one transfer, and if the stamp covers the total consideration money it is sufficient. (*v*) Where shares are themselves the consideration for a purchase, the stamp is regulated by their market value at the time of sale. (*y*)

Stamp.

Whatever may be the legal method of transferring shares, and whether a formal deed is or is not requisite, it is a common practice in the share market for a seller of shares to sign a deed or instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name, or without doing so resells, and hands the blank transfer to the new purchaser, who again either inserts his own name as the transferee, or resells and delivers the transfer, still in blank, to the purchaser from him, and so on. The effect of executing transfers in blank, and handing them from one person to another, is very different with respect to different classes of shares.

Transfers in  
blank.

\*706

A deed executed by A., and purporting to transfer property to —, *i.e.*, to nobody, is altogether inoperative as a deed; and consequently, if a shareholder in a company the shares in which are transferable by deed only, executes a transfer of his shares in blank, he still remains legal owner of the shares and the holders of the deed acquire no other title to the shares than

Blank deeds of  
transfer.

(*q*) *Copeland v. North-Eastern Rail. Co.* 6 E. & B. 277; *R. v. General Cemetery Co.* ib. 415.

(*r*) See *Re Angelo*, 5 DeG. & Sm. 278; *Re Ives*, 9 Jur. N. S. 611; *ante*, p. 704, note (*h*).

(*s*) *Knight v. Barber*, 16. M. & W. 66.

(*t*) *Ib.*

(*u*) See 33 & 34 Vict. c. 97, under the head conveyance.

(*x*) *Wills v. Bridge*, 4 Ex. 193.

(*y*) See 33 & 34 Vict. c. 97, tit. Conveyance; and *Ulverstone Rail. Co. v. The Commissioners of Inland Revenue* 2 H. & C. 855.

a right to have them properly transferred, or to have the transferrer declared a trustee for them. (z) But although a blank deed is invalid as a deed, it by no means follows that Other blank transfers. all transfers in blank are worthless.

In the first place there are shares, *e.g.*, shares in cost-book mining companies, which are transferable without the intervention of any formal document; and a letter signed by a shareholder, and transferring his shares to —, amounts, if delivered to a purchaser, to a transfer to him, and authorizes him to fill up the blank with any name he likes. (a)

In the next place, the equitable ownership in shares agreed to be sold depends on the contract of sale and not on the form of transfer; and as there is no law requiring a Effect in equity of transfers in blank. contract for the sale of shares to be by deed or even in writing, there is nothing to prevent a purchaser of shares from being held to his bargain, nor from being ordered to accept the shares he has agreed to buy, and with them all the liabilities incident thereto. Consequently, where there is a binding agreement for the sale and transfer of shares, it is immaterial whether a transfer in blank has been executed or not. The purchaser can be compelled at the instance of the seller to take his place \*as from the time of \*707 the making of the contract; in other words, the purchaser will be compelled to accept a proper transfer of the shares, to procure himself to be registered as a shareholder in respect of them, and to indemnify the seller from all liabilities accruing in respect of the same shares since the time when they were agreed to be sold. (b) So the purchaser can compel the seller to execute a proper transfer and to account for all dividends received by him since he ceased to be the equitable owner of the shares.

Where, however, there is no valid contract of sale, a blank transfer is as worthless in equity as at law. This is well illustrated by the case of *Taylor v. Great Indian Pen-* Forged transfers.

(z) *Hibblewhite v. McMorine*, 6 M. & W. 200; *Humble v. Langston*, 7 M. & W. 517; *Sayles v. Blane*, 14 Q. B. 205, and 6 Ra. Ca. 79. See, too, *Consols Insur. Assoc. v. Newall*, 3 Fos. & Fin. 130, and *Swan's case*, *infra*, p. 707.

(a) See *Walker v. Bartlett*, 18 C. B. 845.

(b) *Morris v. Cannan*, 4 DeG. F. & J. 581. See *Cheale v. Kenward*, 3 DeG.

& J. 27; *Wynne v. Price*, 3 DeG. & S. 310; *Shaw v. Fisher*, 5 DeG. M. & G. 596, affirming S. C. 1 Jur. N. 971, and 2 DeG. and Sm. 11. See, also, *Contract Corporation*, 3 Ch. 105. In *Jackson v. Cocker*, 4 Beav. 59, a purchaser of scrip was held to be under no such obligations; but see *Beckett v. Bilbrough*, 8 Ha. 188.

insula Railway Company. (c) In that case the plaintiff, who was entitled to some 20*l.* and some 2*l.* shares in a company, directed his broker to sell the latter. The broker obtained forms of transfer, stamped sufficiently to pass the 20*l.* shares; and the plaintiff executed these forms, leaving the blanks to be filled in by the broker. The broker inserted the description of the 20*l.* shares, but left the names of the transferees still in blank. The shares were then sold, and the names of the purchasers were ultimately filled in, they knowing that the transfers had been previously executed in blank. The plaintiff having discovered that the wrong shares had been sold, filed a bill to set aside the sale, and to have the transfers delivered up, and to restrain their registration. A decree was made in his favor by the V.-C. Wood, and an appeal from this decision was dismissed.

A somewhat similar case arose at law; but here the transfers had been actually registered, and the vendor sought to have the registration cancelled. The case came first before the Common Pleas (d), and then before the Exchequer (e), and lastly before the Exchequer Chamber. (f) All the judges agreed that the transfers were wholly void, and conferred no title on the transferee, although he was a *bonâ fide* purchaser; and it was also held by the Exchequer Chamber that the vendor was not estopped, by his own negligence in signing the blank transfers, from asserting his title to the shares. On this point the judges in the courts below had been equally divided. (g)

A transferee of a share does not become a shareholder, nor does a transferrer of a share cease to be a shareholder, until those forms and ceremonies which by the constitution of each company are necessary to be observed, have been either duly complied with or waived by competent authority. The decisions on this subject having been already examined, need not be again adverted to. (h) The transferrer must ascertain by inquiry whether his transfer has been accepted by the company or not; it is not the

(c) 4 DeG. & J. 559. See, also, Johnston v. Renton, 9 Eq. 181, and as to the liability of the company in respect of forged transfers, see that case, and ante, p. 301.

(d) Ex parte Swan, 7 C. B. N. S. 400.

(e) Swan v. North British Australian

Co. 7 H. & N. 603.

(f) 2 H. & C. 175.

(g) See some obs. on this case in 11 Eq. 319.

(h) Ante, p. 136 et seq., and see post, book iv. ch. 3, under the head Contributory.

duty of the company to give him this information if he does not ask for it. (*i*)

The transferee of a share in a company acquires, as between himself and the company, no greater rights than the transfer-  
 ferrer; and this doctrine has been carried so far that it Rights of the  
transferee.  
 has been held that a transferee is precluded from objecting to conduct which has been sanctioned or acquiesced in by his transfer-  
 ferrer. (*k*) The extent to which a transferee of shares takes upon  
 himself the liabilities of the transferer, is examined in other parts  
 of the treatise (*l*); it may, however, be observed generally, that the  
 transferee, as between himself and his transferer, takes the place  
 of the latter, not only as regards what is past, but also as regards  
 what is to come. (*m*) With respect, however, to the title of a trans-  
 feree, it must be remembered that a *bonâ fide* purchaser of shares  
 for value without notice of any invalidity in the title of his trans-  
 ferrer, acquires a title which cannot be impeached by persons  
 claiming a prior equitable \*interest (*n*); moreover, if the \*709  
 company has actually registered such a purchaser, in igno-  
 rance of material facts, the company cannot lawfully afterwards re-  
 move his name from the register. (*o*)

Moreover, it has recently been decided that scrip certificates  
 may be shown to be transferable to bearer by general  
 usage, where there is no enactment or agreement to  
 the contrary; and where this is shown the title of a Scrip, &c.  
transferable  
to bearer  
by usage.  
*bonâ fide* purchaser for value of the scrip without notice of any  
 infirmity in the title of the seller, will be unimpeachable, even al-  
 though the seller himself may have had no title. (*p*) There is as  
 yet no decision to this effect with respect to shares, but if a similar  
 usage as to them can be proved, such usage will probably be up-  
 held. (*q*)

(*i*) See *Gustard's case*, 8 Eq. 438.

(*k*) *Ffooks v. Southwestern Rail. Co.*  
 1 Sm. & G. 168. See, also, *Peek v.*  
*Gurney*, 13 Eq. 79.

(*l*) See as to creditors, *ante*, p. 460,  
 and book ii. ch. 3, § 4: as to calls, *ante*,  
 p. 637, and *post*, book iv. ch. 3, under  
 the head *Contributories*.

(*m*) See *Mayhew's case*, 5 DeG. M &  
 G. 837.

(*n*) *Ante*, pp. 663, 664.

(*o*) *Ward v. South-Eastern Rail. Co.*  
 2 E. & E. 812, where a fraud had been  
 committed on the company.

(*p*) *Rumball v. Metropolitan Bank*,  
 2 Q. B. D. 194, a case of a limited  
 company.

(*q*) See the last case, and *Goodwin v.*  
*Roberts*, 1 App. Ca. 476, and L. R. 10  
 Ex. 337.

Where any company is being wound up by the Court, or subject to the supervision of the Court, all transfers of shares in it subsequent to the presentation of the petition, and prior to the winding-up order, are invalid unless otherwise ordered by the Court. (*r*) Transfers after the winding-up order are not expressly prohibited, but such a transfer does not discharge the transferor from liability to be put on the list of contributories. (*s*) After a resolution to wind up voluntarily, transfers of shares, unless to, or with the sanction of, the liquidators, are also invalid. (*t*) The effect of these provisions upon the question whether a buyer or seller ought to be put on the list of contributories, will be examined hereafter (*u*).

#### \*710 \*SECTION VI.—OF SALES OF SHARES AND QUESTIONS ARISING THEREON.

There is nothing illegal at common law in the sale of shares or scrip. (*x*) At the same time, if a company or projected company is itself illegal, the sale of its shares or scrip is illegal also. (*y*) There is nothing illegal in the sale of shares in companies which are being wound up. (*z*)

A *bonâ fide* contract by a person to deliver shares which he has not got, is legal. (*a*) But a contract for their purchase and sale, where neither party intends to accept or de-

Illegal sales.  
Gaming and  
wagering in  
shares.

(*r*) 25 & 26 Vict. c. 89, § 153.

(*s*) See *ib.* §§ 38, 74, and 84.

(*t*) *Ib.* § 131.

(*u*) See *infra*, book iv. ch. 3, the section on Contributories.

(*x*) See *Ex parte Barclay*, 26 Beav. 177; *Ex parte Aston*, 4 DeG. & J. 320, and 27 Beav. 474; *Ex parte Grise-wood*, 4 DeG. & J. 544; *Bagge's case*, 13 Beav. 162.

(*y*) *Josephs v. Pebrer*, 3 B. & C. 639; *Buck v. Buck*, 1 Camp. 547. The statute of 7 & 8 Vict. c. 110, prohibited the sale of shares in a company governed by it, until after the company had obtained a certificate of complete registration, and even then by any subscriber

not registered as a shareholder, § 26; *Ex parte Neilson*, 3 DeG. M. & G. 556; *Morris v. Cannan*, 4 DeG. F. & J. 581. But the statute is now repealed; and the prohibitions in question never extended to companies the formation of which was commenced before the 1st Nov. 1844 (as to which see *Baker v. Plaslitt*, 5 C. B. 262; *Aston's case*, 27 Beav. 474, and 4 DeG. & J. 320); nor to railway or other companies requiring the authority of Parliament, *Young v. Smith*, 15 M. & W. 121; *Bousfield v. Wilson*, 15 ib. 185; *Lawton v. Hickman*, 9 Q. B. 563.

(*z*) See *Rudge v. Bowman*, L. R. 3 Q. B. 689.

(*a*) *Hibblewhite v. McMorine*, 5 M. &

liver them, and they only intend to pay "differences," according to the rise or fall of the market, is void as a gaming or wagering contract within 8 & 9 Vict. c. 109, § 18. (b) Nevertheless a broker who pays differences for his principal can recover them from him. (c) A conspiracy to obtain a settling day by fraudulent means in order to defraud buyers of shares or a conspiracy \*by fraudulent means to raise or lower the price of shares \*711 with intent to defraud buyers or sellers is an indictable offense. (d)

By 30 Vict. c. 29, § 1, it is enacted that all contracts made after the 1st of July, 1867, for the sale or transfer of any shares, stock, or interest in any Joint-stock Banking Banking Companies. Company in England or Ireland, constituted under or regulated by any act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any written instrument, shall be void unless such contract sets forth in writing the distinguishing numbers of such shares, stock, or interest on the register, or if there is no register, the person in whose name such shares, stock, or interest shall at the time of making such contract stand in the books of the company. The object of this enactment is to prevent runs on banks which may be occasioned by a fall in the price of their shares resulting from gambling transactions. (e)

Neither scrip nor shares are goods or chattels or interests in land within the Statute of Frauds; and (subject to Agreements for sale of shares. the qualification introduced by the act just noticed) a contract for the sale of them is therefore valid, although not reduced into writing and signed by either buyer or seller or by any agent of either of them. (f) At the same time, if a contract for the sale of shares is reduced into writing, that writing is the proper

W. 462; *Barry v. Croskey*, 2 J. & H. 1; *Ex parte Phillips*, and *Ex parte Marnham*, 2 DeG. F. & J. 634.

(b) *Grisewood v. Blane*, 11 C. B. 539; *Rees v. Fernie*, 4 N. R. 539, and the cases in the last note. The old Stock-jobbing act (Sir John Barnard's act), 7 Geo. 2, c. 8, was repealed by 23 & 24 Vict. c. 28. It did not apply to shares in companies. See *Hewitt v. Price*, 4 Man. & Gr. 355; *Williams v. Trye*, 18 Beav. 366. See, too, *Ex parte Turner*,

3 DeG. & J. 46, and the cases there cited.

(c) *Rosewarne v. Billing*, 15 C. B. N. S. 316.

(d) See *R. v. Aspinall*, 1 Q. B. D. 730, and 2 ib. 48; *R. v. Berenger*, 3 M. & S. 67; *R. v. Esdaile*, 1 Fos. & Fin. 213.

(e) See, as to numbering shares, *ante*, p. 132.

(f) *Ante*, pp. 674, 675.

evidence of the contract, and must therefore be produced properly stamped. (*g*)

As regards delivery it is to be observed that shares and certificates are different things; and an agreement to *deliver* shares is performed by the execution and delivery of a proper transfer. Actual delivery of the share certificates is not essential to the performance of the contract. (*h*)

## \*712

\*1. *Sales not on Stock Exchange.*

Sales of shares  
not on the  
Stock Ex-  
change.

A contract for the sale of shares, although usually made through members of the Stock Exchange, may be made without their intervention.

Vendor's obli-  
gations.

A simple contract for the sale of shares imposes on the vendor the obligation of delivering to the purchaser on the day fixed, or if no time be fixed within a reasonable time after the date of the contract, the number of shares agreed to be sold. But, except in cases to which 30 Vict. c. 29 is applicable (*i*), or unless there be some special stipulation to that effect, the vendor is not bound to deliver any particular shares; nor is it important whether when he agreed to sell he actually had any shares or not (*k*); it is sufficient if he procures them in time. Neither is it necessary that the shares should be actually vested in him, or that he should be the actual transferrer; it being immaterial to the purchaser by whom the transfer to him is made, provided only the transferrer's title is good. (*l*)

Duty to pro-  
cure transfer.

It has been said that it is the vendor's duty to procure the registration of the shares in the name of the purchaser. (*m*) But this is probably going too far; and it appears more correct to say that the purchaser takes the risk of any objection being made by the company to himself as the transferee; and also the risk of all other objections not based on the right of the trans-

(*g*) Knight *v.* Barber, 16 M. & W. 66, and *ante*, pp. 674, 705. 33 & 34 Vict. c. 97, § 69 *et seq.*

(*h*) Hunt *v.* Gunn, 13 C. B. N. S. 26, and 3 Fos. & Fin. 223.

(*i*) *Ante*, p. 711.

(*k*) *Ante*, p. 710, note (*a*).

(*l*) See the judgment of Lord Blackburn in Maxted *v.* Paine, No. 2, L. R. 6 Ex. 132.

(*m*) Wilkinson *v.* Lloyd, 7 Q. B. 27; Lloyd *v.* Crispe, 5 Taunt. 249. See, also, Birmingham *v.* Sheridan, 33 Beav. 660.

ferrer to transfer his shares. (*n*) The vendor, however, must do whatever is necessary to perfect his right to transfer, *e. g.*, pay all calls which become due before the purchaser becomes in equity the owner of the shares.

With respect to the title which a vendor of shares can be required to show, the distinction between incorporated and unincorporated companies is of great importance. Vendor's title.

A vendor of a share in an incorporated company has only to show a title \*to the shares he proposes to transfer; and he \*713 cannot be required to show any title in the company to its landed property or other assets. (*o*) But the title of a vendor of a share in an unincorporated company is not so clearly separable from the title of the company; and a vendor who sells a share in such a company without special conditions runs the serious risk of finding himself embarrassed by requisitions respecting the title of the company to its landed property. (*p*)

The cases referred to below are quite sufficient to render it prudent for a vendor of shares in an unincorporated company to stipulate that he shall not be required to adduce any evidence of the title of the company to any property whatever; and for a vendor of shares in any company to stipulate that he shall not be required to adduce any evidence of his own title, except the registry of himself as a shareholder in respect of the shares offered for sale. (*q*)

The obligation of the purchaser is to pay the price agreed upon, and to accept a transfer of the shares, and to indemnify Purchaser's obligations. the vendor from all liability in respect of them accruing after the purchaser has become their equitable owner. (*r*) It has long been established that a contract for the sale and purchase of shares is one of which specific performance will be enforced (*r*): whence it follows that from the time when his contract ought to have been performed the purchaser becomes in equity the owner of

(*n*) See *Stray v. Russell*, 1 E. & E. 888, and Lord Blackburn's judgment in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132, and the cases *Evans v. Wood*, 5 Eq. 9; *Hodgkinson v. Kelly*, 6 Eq. 496, which, however, are all Stock Exchange cases.

(*o*) See *Shaw v. Fisher*, 2 DeG. & Sm. 11, and 5 DeG. M. & G. 596, as to the title which can be required in these cases.

(*p*) See *Curling v. Flight*, 6 Ha. 41, and 2 Ph. 613; *Stevens v. Guppy*, 3 Russ. 171; *Morris v. Kearsley*, 2 Y. & C. Ex. 139.

(*q*) See *Hare v. Waring*, 3 M. & W. 362; as to evidence of title by entries in a company's books.

(*r*) *Cheale v. Kenward*, 3 DeG. & J. 27; *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 2 DeG. & S. 11, and 5 DeG. M. & G. 569.

the shares; and all the rights and obligations incidental to such ownership attach to him. Moreover, this relationship of *trustee and cestui que trust* may be created, not only by a direct contract between the parties, but in other ways—*e. g.*, if there is a series of assignments by equitable owners, the ultimate assignee will be the *cestui que trust* of the legal owner, and be bound to indemnify him accordingly. Numerous authorities illustrate these principles; \*but as they relate to purchases and sales through brokers they will be noticed hereafter. (s)

The obligation of a purchaser to pay the price, accept the shares, and indemnify the vendor against liability in respect of them, was recognized at law even before the Judicature acts; and for a breach of such an obligation an action will lie. (t) Moreover this obligation exists and will be enforced notwithstanding the shares may have become valueless since the date of the contract by reason of the stoppage of the company or otherwise (u), and notwithstanding they cannot be registered in the name of the purchaser. (u) The risk is on the purchaser, and as he benefits by a rise in the value of the shares, so he suffers if they become worthless or worse.

Further, a contract for the sale of shares in a company being wound up under the act of 1862 is perfectly valid, although made during the liquidation of the company. The provisions of the Companies act, 1862, §§ 131–153, declaring certain transfers made after the commencement of the winding up to be void, operate only to prevent the registry of shareholders or the list of contributories from being altered by reason of such transfer (v); and such a contract is binding upon a pur-

Sales of shares  
in companies  
being wound  
up.

(s) See *inter alia* *Shepherd v. Gillespie*, 5 Eq. 293; *Evans v. Wood*, ib. 9; *Paine v. Hutchinson*, 3 Eq. 257, where forms of decree are given.

(t) See *Kellock v. Enthoven*, L. R. 9 Q. B. 241; affirming S. C. 8 Q. B. 458, where the vendor was made a contributory as a past member; *Walker v. Bartlett*, 18 C. B. 845, and *Humble v. Langston*, 7 M. & W. 517.

(u) See, at law, *inter alia*, *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; and in equity, *inter alia*, *Paine v.*

*Hutchinson*, 3 Eq. 257, and 3 Ch. 388; *Evans v. Wood*, 5 Eq. 9; *Hodgkinson v. Kelly*, 6 Eq. 496; *Hawkins v. Maltby*, 6 Eq. 505, and 4 Ch. 200, which, however, were all cases in which the defendant had accepted the transfers. Compare *Birmingham v. Sheridan*, 33 Beav. 660, which, however, cannot now be relied on, as was admitted by the M. R. in *Fenwick v. Wood*, 6 June, 1870, and see 3 Ch. 393.

(v) *Biederman v. Stone*, L. R. 2 C. P. 504; *Rudge v. Bowman*, L. R. 3 Q. B. 689.

chaser although he can show that he was ignorant of the fact of the company having gone into liquidation. (*x*)

\*On the other hand, a contract for the sale and purchase of shares does not bind the purchaser to accept what does not answer the description of the shares which he agreed to buy. If, therefore, such shares do not exist, he is not compellable to pay the price agreed upon; and if he has paid it in ignorance of the facts, he can recover it back as money paid for a consideration which has failed. (*y*)

\*715 Position of parties where the shares bought and sold are not identical.

In *Kempson v. Saunders* (*z*) it was held that a purchaser of shares in a projected company which was never formed, was entitled to recover back his money from the vendor, although the vendor was not an original subscriber, and had himself purchased the shares from other persons. This case was decided upon the ground that the subject-matter of the contract had no existence, there being no company, and consequently no shares in it to buy or sell. Had the contract been for the sale and purchase of the right of the vendor to shares in the company when it should be formed, it could hardly have been held that there was nothing to buy or sell, or that the purchaser could have recovered back his money, although he might not in fact have got anything of the slightest value for it.

*Kempson v. Saunders.*

Again, where shares are apparently bought, and the certificates for them proved to be forged, the purchaser can recover their price from the vendor. (*a*)

Strictly speaking, it is the purchaser's duty to prepare the transfer, and to tender it to the transferrer for execution (*b*); but the form of transfer is so simple that in practice the vendor fills it up and sends it to the purchaser to execute. The effect of a transfer in blank has been already considered (*c*), as has the question whose duty it is to procure it to be registered. (*d*)

Preparation of transfer.

An important question connected with the transfer is, whether

(*x*) *Rudge v. Bowman*, L. R. 3 Q. B. 689, 697. See, as to enforcing such a contract in equity, *Emmerson's case*, 1 Ch. 433, explained by Wood, L. J. in *Paine v. Hutchinson*, 3 Ch. 388, 391.

(*y*) *Watkins v. Huntley*, 2 Car. & P. 410, note; *Westropp v. Solomon*, 8 C. B. 345.

(*z*) 4 Bing. 5. Compare *Stent v. Bail-*

*is*, 2 P. W. 217.

(*a*) *Royal Exchange Assur. Co. v. Moore*, 2 N. R. 63, Q. B., a case of forged debentures.

(*b*) *Humble v. Langston*, 7 M. & W. 517, and *per* Lord Blackburn, in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

(*c*) *Ante*, p. 705, *et seq.*

(*d*) *Ante*, p. 712.

the vendor is bound to transfer to any person nominated by the purchaser, or can insist on transferring to the purchaser \*himself. As will be seen hereafter, a purchaser of shares sold on the Stock Exchange is entitled to require a transfer to himself or his nominee. (e) Lord Blackburn has stated his opinion to be that any other purchaser has the same right. (f) But it must be borne in mind that a transfer does not always relieve a transferrer from all liability (g), and that it is often a matter of great importance to a transferrer that his transferee shall be a person of substance. Whatever, therefore, the rule may be in cases where the transferor is under no liability, or where by his transfer he frees himself from all liability, it is very questionable whether a vendor of shares who has not agreed expressly or impliedly (by selling on the Stock Exchange) to transfer to the nominee of the person with whom he has contracted, is under any obligation to transfer to such nominee. (h) A vendor of a leasehold estate who has himself entered into onerous covenants, is surely not under any obligation to assign to a pauper at the request of the purchaser, unless indeed the purchaser enters into a covenant for indemnity which would obviously remove the vendor's objections.

A partner who sells his share of partnership real estate is apparently entitled to the ordinary lien of a vendor of real estate for the unpaid purchase-money. (i) But there is no sufficient analogy between a sale of real property and a sale of a share in an incorporated company to warrant any such lien upon the sale of such a share. It is conceived, however, that an unpaid vendor of a share in a company has the same right of stopping the delivery to an insolvent purchaser that a seller of ordinary goods has in similar cases.

(e) *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

(f) See his judgment in the case last cited.

(g) *E. g.*, in companies formed and registered under the Companies act, 1862, from liability as a past member.

(h) *Coles v. Bristowe*, 4 Ch. 3, is in authority to the effect that he is not.

(i) *Stuart v. Ferguson, Hayes, Ir. Ex.*

452. In this case the lien contended for was held to have been excluded by the vendor's agreement to let the purchase-money remain in the concern at a high rate of interest. Moreover, even if the lien had ever existed, there was evidence to show that it had been discharged. Had it not been for these circumstances, the existence of the lien contended for would apparently have been established.

A person who sells shares in a company which he knows has no existence, is guilty of a fraud for which he is criminally \*responsible. (*j*) But the rule \*717 <sup>Fraudulent sale.</sup> *caveat emptor* renders it lawful for a person holding shares in an insolvent company to sell them to any one willing to buy them; and in the absence of misrepresentation by the seller, the buyer is apparently without remedy against him. (*k*)

A person who has been induced to purchase shares by fraud on the part of the seller, can, at his option, either keep the shares and sue for the damage he has sustained by <sup>Fraud by the seller.</sup> the fraud, or repudiate the contract, and recover the money paid under it. But he cannot adopt the latter alternative unless he can, when the action is brought, restore the shares in the same state in which he took them, and place the seller in the same position in which he stood before the sale. (*l*) The purchaser can also maintain an action to rescind the contract, and to compel the vendor to indemnify him. And the fact that the plaintiff sold some of the shares before he knew of the fraud, will not disentitle him to relief, if the contract is severable; and this it has been held to be, where all the shares bought are shares in the same company. (*m*) Nor will the forfeiture of the shares after the commencement of the action affect his rights. (*n*) Unless, however, the company is implicated in the fraud, the purchaser, if he has become a shareholder, cannot, it is conceived, prevent calls being made upon him. (*o*)

If a person is induced to sell shares by the fraud of the purchaser, the vendor has similar rights to those which a purchaser has in the converse case already considered. <sup>Fraud on seller.</sup> But where the purchaser is innocent of the fraud, and a person's shares have been fraudulently sold and transferred by others,

(*j*) See *Maccallum v. Turton*, 2 Y. & J. 183.

(*k*) See *Remfrey v. Butler*, E. B. & E. 887; *Stray v. Russell*, 1 E. & E. 888, and *ante*, p. 714.

(*l*) *Clarke v. Dickson*, E. B. & E. 148; and see *Maturin v. Tredinnick*, cited in the next note. As to actions for damages sustained by taking shares on the faith of fraudulent statements, see *Clarke v. Dickson*, 6 C. B. N. S. 453; *Bedford v. Bagshaw*, 4 H. & N. 538;

*Davidson v. Tulloch*, 3 Macqueen. 783; *Twycross v. Grant*, 2 C. P. D. 469.

(*m*) *Maturin v. Tredinnick*, 2 N. R. 514, and 4 ib. 15.

(*n*) *Ibid.*

(*o*) See *infra*, book iii: ch. 10, § 3, and book iv., under the head *Contributories*. *Bloxam v. Metropolitan Cab. Co.*, 4 N. B. 51, V. C. W., where an injunction was granted is, it is conceived, not opposed to this, as the plaintiff was not a shareholder.

\*718 \*his rights against the transferee will depend upon whether the latter has acquired the legal ownership or the right to call for the legal ownership, *bonâ fide*, for value, and without notice of the fraud. If he has, his title cannot be impeached (*p*); but if he has not, the shares may be recovered from him, unless the claimant has lost his right to relief by his own negligence, lapse of time, or some other special circumstance. (*q*)

Shares are not unfrequently sold by auction. If an auctioneer sells shares, without disclosing the persons on whose behalf he sells, he will be personally responsible for the due completion of the sale, and will be liable to the purchaser in damages for the non-transfer of the shares to him. (*r*) Moreover, if in such a case the auctioneer, when called upon to transfer the shares, refers the purchaser to the owners, it becomes unnecessary for the purchaser to tender a deed of transfer to the auctioneer before suing him, for by such a reference the auctioneer discharges the purchaser from tendering any deed of transfer to him. (*s*) If shares are sold subject to a condition that if they are not paid for by a certain time, the seller shall be at liberty to resell them, and shall be entitled to recover from the purchaser any loss sustained by the resale, and the shares are sold and resold under this condition, the first purchaser can be sued on the special contract entered into by him. (*t*)

In an action by a purchaser of shares against a seller, for not transferring the shares bought, the purchaser must aver, and if the averment is traversed, prove—1, that he was ready and willing to pay for the shares (*u*), and 2, that he tendered to the seller for his execution a proper instrument of transfer. (*v*) The necessity for such tender, however, only

\*719 exists upon the \*supposition that some formal document is required to render the transfer of the shares complete, and upon the further supposition that the seller has not discharged the purchaser from making the tender. (*x*)

(*p*) See *Dodds v. Hills*, 2 Hem. & M. 424; *Donaldson v. Gillot*, 3 Eq. 274; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194, *ante*, pp. 663, 664.

(*q*) See *Taylor v. Great Indian Rail. Co.* 4 DeG. & J. 559, and other cases cited, *ante*, p. 707.

(*r*) *Franklyn v. Lamond*, 4 C. B. 637.

(*s*) *Ib.*

(*t*) *Lamond v. Davall*, 9 Q. B. 1030.

(*u*) *Lawrence v. Knowles*, 5 Bing. N. C. 399. In *Tempest v. Kilner*, 2 C. B. 300, the averment of readiness and willingness was traversed too largely.

(*v*) *Stephens v. DeMedina*, 4 Q. B. 422; *Bowlby v. Bell*, 3 C. B. 284; *Green v. Murray*, 6 Jur. 728, Q. B.

(*x*) *Franklyn v. Lamond*, 4 C. B. 637.

Again, a seller suing a purchaser for not accepting shares must aver, and if necessary prove, readiness and willingness on his, the seller's part to transfer those shares to the purchaser. (y) The circumstances that a call is due upon shares agreed to be sold, and that they are not transferable so long as the call remains unpaid, do not disprove readiness and willingness on the part of the seller to transfer, if he was in fact ready and able to pay the call in question. (z)

The effect of transfers in blank has been already considered (a). The decisions at law on this subject must now be taken with the qualifications rendered necessary by the decisions in equity. (b)

In an action by the seller of shares against the purchaser for not accepting them, the damages are measured by the difference between the contract price and the market price at the time of the purchaser's breach of contract (c); and it is for the jury to determine when this time was. (d) So, in an action by the purchaser of shares against the seller for not delivering them, the damages are measured by the difference between the contract price and the market price at the time when they ought to have been delivered. (e) Where, however, an action is brought for not re-delivering shares lent and agreed to be returned on a given day, the damages are measured by the market price of the shares at the time of the trial (f); and the same rule is adopted in estimating damages \*in actions against com- \*720 panies for not delivering shares at the time they ought. (g)

An action will lie for specific performance of a contract for the purchase and sale of shares (h) if it is capable of being performed (i); and the purchaser will be compelled to

Actions by seller against purchaser.

Transfers in blank.

Damages recoverable when contract for sale is broken.

Specific performance of contract of sale.

(y) *Hannuic v. Goldner*, 11 M. & W. 849. As to the duty to procure a transfer, see *ante*, p. 712, and *infra* p. 726.

(z) *Shaw v. Rowley*, 16 M. & W. 810.

(a) *Ante*, p. 705.

(b) See *Hibblewhite v. McMorine*, 6 M. & W. 200, and the cases *ante*, p. 706.

(c) *Shaw v. Holland*, 15 M. & W. 136; *Stewart v. Cauty*, 8 M. & W. 160; *Pott v. Flather*, 5 Ra. Ca. 85.

(d) *Ibid.*, and see *Barned v. Hamilton*, 2 Ra. Ca. 624.

(e) *Tempest v. Kilner*, 3 C. B. 253.

(f) *Owen v. Routh*, 14 C. B. 327. If the shares have been returned, the damages must be limited to the loss caused by their detention. *Williams v. Archer*, 5 C. B. 318.

(g) *Cockerell v. Van Diemen's Land Co.* 18 C. B. 454, and 1 C. B. N. S. 732.

(h) *Ante*, p. 714.

(i) See, as to this, *Birmingham v. Sheridan*, 33 Beav. 660, and compare *Poole v. Middleton*, 29 Beav. 646; and see *ante*, pp. 713, 714, from which it

pay the price, although it may have been expressed to be paid in the deed of transfer, if, in fact, it was not thus paid (*j*); and will be compelled to accept a transfer of the shares he has bought, and to indemnify the seller from all liabilities accruing subsequently to the sale (*k*); and the seller will be compelled to account for any monies he may have received from an improper subsequent sale to another person. (*l*) The Court has, however, refused to compel a purchaser of script to accept shares, and indemnify the seller from calls upon them (*m*); and to compel an allottee of shares to accept them, and to execute the company's deed in respect of them (*n*); and to compel the promoters of a company to deliver shares to a subscriber to the company. (*o*) Neither will the Court interfere to compel the completion of a gratuitous and intended transfer. (*p*)

In *Poole v. Middleton*, (*q*) a purchaser of shares obtained a decree against the seller for the specific performance of the contract of sale, although the directors refused to allow the \*defendant to transfer his shares. The contract was valid without their consent; and they could not prevent the defendant from completing it, nor object to that mode of transfer which they were in the habit of allowing in other cases.

Relief where  
directors refuse  
to allow a  
transfer.

\*721

## 2. Sales on the Stock Exchange.

Having now alluded to contracts for the sale of shares otherwise than on the Stock Exchange, it is proposed to notice the effect of entering into such contracts through members of that body. In practice scrip and shares are usually bought

appears, that although registration in the purchaser's name may be impossible, he can be compelled in equity to indemnify the vendor.

(*j*) *Wilson v. Keating*, 27 Beav. 121, and 4 DeG. & J. 588. The case seems, at first sight, to have been a hard one upon the defendant; but the deed stated that *he* had paid the money, and this he knew was not the fact. He could not, therefore, be treated as having been misled by the plaintiff or by the contents of the deed.

(*k*) *Wynne v. Price*, 3 DeG. & S. 310- and other cases cited, *ante*, pp. 713,

714. As to the right of a mortgagee of shares to an indemnity from his mortgagor, see *Phene v. Gillan*, 5 Ha. 1.

(*l*) *Beckett v. Bilbrough*, 8 Ha. 188.

(*m*) *Jackson v. Cocker*, 4 Beav. 59. Compare this with the last case.

(*n*) *Sheffield, &c., Gas Co. v. Harrison*, 17 Beav. 294.

(*o*) *Columbine v. Chichester*, 2 Ph. 27. In this case, however, the promoters did not appear to have any shares which they could allot.

(*p*) See *Milroy v. Lord*, 8 Jur. N. S. 806, L. J.

(*q*) 29 Beav. 646,

and sold through jobbers and brokers (*r*); and a person employing a broker to buy or sell is, in the absence of evidence to the contrary, presumed to authorize him to buy or sell according to the rules and usages prevailing in the market where the commodity is to be bought or sold (*s*); and persons employing members of the Stock Exchange as their brokers are bound by the rules and usages which govern that body (*t*); provided they are not unreasonable, or on some other ground illegal. What these rules and usages are is a question of fact to be proved by the person who relies on them; and in considering the cases it is important to bear in mind that the decisions are made only with reference to the custom as proved or admitted in the particular case under consideration, and do not conclude the question as to what the custom really is.

Besides the printed rules of the Stock Exchange there are \*certain established practices observed by its members, and \*722 which are as binding upon them as the printed rules themselves. Both the rules and unwritten practices are altered from time to time, but a contract must be interpreted according to the custom as it existed at the date of the contract. (*u*)

The rules and practices of the Stock Exchange respecting the sale and purchase of shares will be found stated in *Maxted v. Paine* (*v*), *Bowring v. Shepherd* (*w*), *Grissell v. Bristowe* (*x*), *Coles v. Bristowe* (*y*), *Rennie v. Morris* (*z*), and *Merry v. Nickalls* (*a*); and from those cases it appears that in the

(*r*) Brokers buy and sell for principals, jobbers for themselves; but as between all members of the Stock Exchange brokers are always regarded as principals; and for the purposes of the text there is no material distinction between brokers and jobbers. That their liabilities on these contracts are alike, see Lord Blackburn's judgment in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132. See, as to brokers *ante*, p. 187, and *Baring v. Corrie*, 2 B. & A. 137. In this case it is said brokers have no business to contract as principals; but this has no application to sharebrokers, as is evident from the cases alluded to in the text.

(*s*) See *Fleet v. Murton*, L. R. 7 Q. B. 126; *Mollett v. Robinson*, L. R. 5 C. P. 646, affirmed L. R. 7 C. P. 84, and the

cases there referred to.

(*t*) *Stray v. Russell*, 1 L. & E. 885; *Biederman v. Stone*, L. R. 2 C. P. 504; *Grissell v. Bristowe*, L. R. 4 C. P. 36; *Coles v. Bristowe*, 4 Ch. 3; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; *Duncan v. Hill*, L. R. 6 Ex. 255, reversed in part, L. R. 8 Ex. 242.

(*u*) *Per* Lord Blackburn, *Maxted v. Paine*, 2nd action, L. R. 6 Ex. 132, 160.

(*v*) L. R. 4 Ex. 203, and 6 Ex. 132.

(*w*) L. R. 6 Q. B. 309.

(*x*) L. R. 4 C. P. 36, and 3 C. P. 112.

(*y*) 4 Ch. 3, and 6 Eq. 149.

(*z*) 13 Eq. 203, overruled by *Merry v. Nickalls*.

(*a*) 7 Ch. 733, and L. R. 7 H. L. 530.

ordinary course of events a sale of shares on the Stock Exchange is essentially a transaction of the following description:—

1. There is a contract between the selling and buying broker or jobber, to the effect that on a given day, called the account day, the shares shall be deliverable and the price payable.

2. That on the day before the account day (called the name day) the buying broker or jobber gives or passes to the selling broker a ticket containing the name of the person to whom the shares are to be transferred, and the price which that person has agreed to pay for them.

3. That the name so passed can be objected to within a limited time (10 days); and if objected to on reasonable grounds, must be replaced by another name; the committee of the Stock Exchange deciding, in case of dispute, whether another name is to be given or not.

4. That the above-mentioned ticket is prepared by the broker of the ultimate purchaser, and is passed (between 12 and 2 o'clock on the name day) by such broker to his immediate vendor, and by him to his vendor, and so on, until it reaches the broker of the original seller. The ticket is endorsed by each member of the Stock Exchange, with his own name, as it passes through his hands.

5. That the original seller executes a transfer (prepared by his broker) to the ultimate purchaser; the consideration for  
\*723 \*such transfer being usually stated to be the price agreed to be paid by such purchaser. (b)

6. That the selling broker looks for payment of the price at which he sold to the broker or jobber who bought of him; but usually takes from the broker of the ultimate purchaser the money he has agreed to pay, and then settles for the difference, if any, with the broker or jobber with whom he, the selling broker, originally contracted.

From this statement it is apparent that important and difficult questions of law are likely to arise, and, in order to solve them, it is proposed to consider the position—

1. Of the vendor and of the broker or jobber who agrees to buy from him.

(b) The confusion introduced by this circumstance led to a variance between the pleadings and the evidence in

Hawkins v. Maltby, 3 Ch. 188, which, however, was put right in the 2nd suit, 6 Eq. 505, and 4 Ch. 200.

2. Of the vendor and the ultimate purchaser.
3. Of the vendor and the undisclosed and intermediate purchasers.
4. Of the vendor and purchaser as regards their respective brokers.

1. *As to the position of the vendor and of the broker or jobber who agrees to buy from him.*

There is a clear contract between these parties which each can enforce against the other. This has never been doubted; but the real nature of the contract has given rise to much controversy. From the most recent decisions, however, it seems that the true contract is to the effect that the vendor will transfer to the buyer or to his nominee, and that the broker or jobber will either accept the shares and pay for them and indemnify the seller against all liability in respect of them, or find some other person to do so; and that person must be a person *sui juris* who has himself agreed to take the shares, and to whom no reasonable objection can be taken. (a)

Accordingly, where the name of an infant was passed, and the transfer was made to him, the purchasing jobber was held liable to the vendor, although being ignorant of the infancy \*he had made no objection to the trans-  
 feree within the time fixed by the rules of the Stock Exchange. (d) So, where a jobber passed the name of a person whose broker had exceeded his authority, by extending the time for completing the sale, and that person declined to accept a transfer, it was held that the jobber had not relieved himself from liability in respect of his contract. (e) So, also, where the name passed was that of a foreigner resident at Smyrna, it was held, in substance, that the vendor might reasonably object to it; and having done so, that the jobber remained liable. (f)

But if the person whose name is given is *sui juris*, and is one to whom the vendor may reasonably object, and he allows the time for objecting to pass, and executes a transfer to that person, the purchasing broker or jobber is discharged from

Contract between vendor and purchasing broker or jobber.

\*724 Instances of jobber's liability.

Waiver of objection to nominee.

(c) See *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132, and the cases cited in the next few notes.

(d) *Merry v. Nickalls*, L. R. 7 H. L. 530, and 7 Ch. 733; overruling *Rennie*

*v. Morris*, 13 Eq. 203.

(e) *Maxted v. Paine*, 1st action, L. R. 4 Ex. 81.

(f) *Allen v. Graves*, L. R. 5 Q. B. 478.

all further liability, unless, as sometimes happens, he has expressly undertaken some further obligation, *e.g.*, to guarantee registration of the transfer.

In *Grissell v. Bristowe (g)*, and *Coles v. Bristowe (h)*, the seller had executed a transfer to the person whose name was given as the ultimate purchaser, and he paid for the shares and kept the transfers, but did not execute them, and did not procure them to be registered in his name. The seller consequently remained liable to the company for calls, and he sought to compel the jobber who first bought the shares to indemnify him. But it was held both by the Court of Exchequer Chamber and by the Court of Appeal in Chancery that the jobber had duly discharged his obligations, and had ceased to be liable. In these cases it did not appear that the transferee could have been reasonably objected to; but the decisions showed the true position of purchasing jobbers, and paved the way to those which follow.

In *Maxted v. Paine, No. 2 (i)*, the name passed was one \*725 which could have been reasonably objected to, and was the name of a nominee of the true purchaser, who was paid by him for accepting the transfer. It was, nevertheless, held, that there being no fraud on the part of the defendant (the first purchasing jobber), he had discharged his obligation, by procuring the acceptance of a transfer by a person who could not himself repudiate it, and to whom the vendor had not objected in due time. This case shows conclusively that as between the vendor and purchasing jobber, and where they both act *bond fide*, it is the duty of the vendor to make inquiry respecting his proposed transferee.

If, as sometimes happens, the purchasing broker or jobber has expressly guaranteed the registration of the shares, he is liable to indemnify the seller against the consequences of their non-registration in the name of the transferee (*k*); but he is not liable for the solvency of the transferee.

(g) L. R. 4 C. P. 36, reversing S. C. 3 C. P. 112.

(h) 4 Ch. 3, reversing S. C. 6 Eq. 149.

(i) L. R. 6 Ex. 132, and 4 Ex. 203.

See as to the judgment of Lord Black-

burn, in this case, *Merry v. Nickalls*, 7 Ch. 733.

(k) *Cruse v. Paine*, Eq. 641, and 4 Ch. 441.

2. *As to the position of the vendor and the ultimate purchaser.*

When the ticket containing the name of the ultimate purchaser issued by his brokers is delivered to the vendor, and he has executed a transfer of his shares, and that transfer has been accepted by the purchaser, and he has paid the price, it is plain that the vendor has become a trustee for the purchaser, and that the purchaser is bound to indemnify the vendor against all liability in respect of the shares. (*l*) This has been decided even where the purchaser has not executed the transfer (*l*); and where the registration of the transfer cannot take place by reason of the stoppage of the company. (*m*)

Contract between vendor and his transferee.

Even before the Judicature acts, where the vendor and ultimate purchaser had been thus brought into direct communication with each other, the vendor could sue the purchaser \*at law for such indemnity (*n*): for then, at all events, there was clearly a contract between them. (*o*)

The precise moment when the contract in these cases is first created, has given rise to some difference of opinion, but the better opinion seems to be that a contract between the vendor and the ultimate purchaser exists, as soon as the ticket containing the purchaser's name has been handed, by his authority, to the vendor, and he has accepted the name, and indicated that acceptance to the purchaser. (*p*) This opinion is based upon the

Privity of contract.

(*l*) *Paine v. Hutchinson*, 3 Eq. 257, and 3 Ch. 388; *Hodgkinson v. Kelly*, 6 Eq. 496; *Hawkins v. Maltby*, 6 Eq. 505, and 4 Ch. 200; *Shepherd v. Gillespie*, 5 Eq. 293; *Sheppard v. Murphy* Ir. Rep. 2 Eq. 544, and 16 W. R. 948; *Wynne v. Price*, 3 DeG. & Sm. 310.

(*m*) *Evans v. Wood*, 5 Eq. 9; *Hodgkinson v. Kelly*, 6 Eq. 496; *Holmes v. Symons*, 13 Eq. 66. Compare *Bermingham v. Sheridan*, 33 Beav. 660, which cannot now be relied upon. See, on it, 3 Ch. 393.

(*n*) *Kellock v. Enthoven*, L. R. 9 Q. B. 241; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; *Davis v. Haycock*, L. R. 4 Ex. 373; *Walker v. Bartlett*, 18 C. B. 845, reversing S. C. ib. 446; *Humble v. Langston*, 7 M. & W. 517. The ac-

tion should be for not indemnifying the seller. See *Sayles v. Blayne*, 14 Q. B. 205, and 6 Ra. Ca. 79, and the cases above.

(*o*) See, as to this, *Hawkins v. Maltby*, 3 Ch. 188, where the contract was held to be misstated. This, however, was put right in the 2nd suit, 6 Eq. 505.

(*p*) See acc. per Christian, L. J., *Sheppard v. Murphy*, 16 W. R. 948, 956; per Brett, J., in *Bowring v. Shepherd*, L. R. 6 Q. B. 309, 328; per Kelly, C. B., in *Davis v. Haycock*, L. R. 4 Ex. 373, 384-386. See, also, per Lord Blackburn, in *Maxted v. Paine*, 2nd action, L. R. 6 Ex. 132, 166. See, contra, Mr. Justice Lush's judgment in the same case.

ground that the ticket is drawn up and issued by the agent of the purchaser, who is authorized to use the machinery of the Stock Exchange, and to transmit the ticket to any person to whom the operation of that machinery may bring it. When that person is ascertained, and the ticket is handed to him, an offer is made by the purchaser to buy of the vendor, upon the terms specified on the ticket: and if the vendor accepts that offer, and informs the purchaser that he has done so, it is difficult to see that anything further is required to make a contract between the parties. This point, however, has ceased to be of the same importance as before the Judicature acts: for now, if the relation of trustee and *cestui que* trust is shown to exist, it becomes unnecessary to consider whether there was a contract between the plaintiff and the defendant or not.

It was settled in *Stray v. Russell* (*q*), that in sales on the Stock Exchange, it is not the duty of the seller of shares to procure their transfer to the purchaser; and that a person \*who buys shares through a broker may be compelled to pay for them, although the company may decline to accept him as a shareholder. The facts of this case were as follows:—Some shares in the Royal British Bank were sold by the defendant to the plaintiff through brokers, who were members of the Stock Exchange. Soon after the sale the bank stopped payment, and the directors refused to allow any transfers of shares. The plaintiff, the purchaser, repudiated the purchase, and directed his broker not to pay the purchase-money. The broker, however, did pay it, as he was bound to do by the rules of the Stock Exchange. By the same rules it was incumbent on the purchaser, and not on the seller, to obtain the consent of the directors to the transfer. The plaintiff took no steps to procure such consent, and refused to repay his broker the money he had paid for the shares. This, however, the plaintiff was ultimately compelled to do by an action at law (*r*), and he then brought an action to recover their price from the seller. It was held that the action could not be sustained: 1. Because there had not been a total failure of consideration, inasmuch as the plaintiff had got the transfers and the certificates; 2. Because, by the rules of the Stock Exchange, it was not the duty of the seller to procure the consent of the di-

(*q*) 1 E. & E. 888. As to sales not on the Stock Exchange, see p. 712.

(*r*) See *Taylor v. Stray*, 2 C. B. N. S. 175 and 197.

rectors to the transfers; and, 3. Because the plaintiff was not himself ready and willing to perform the contract on his part.

A reasonable time for the transfer of shares bought and sold is implied in the contract for sale; and where the sale is made through brokers, the rules of the Stock Exchange <sup>Time for completing transfers.</sup> fixing the time within which shares sold are to be delivered are admissible in evidence upon the question what is reasonable time, although the buying and selling brokers are not proved to be members of the Exchange. (*s*)

\*3. *As to the position of the vendor and the undisclosed and intermediate purchasers.* \*728

If the first purchaser is a broker buying for a principal, the liabilities of such principal are the same as the liabilities of a purchasing broker or jobber. (*t*) These have <sup>Undisclosed principals.</sup> been already examined.

But in the course of a sale on the Stock Exchange, the only persons who are brought into contact with the vendor are the first and ultimate purchasers. With the intermediate purchasers he has ordinarily nothing to do, and unless under exceptional circumstances, he has no rights against them. (*u*) A vendor, for example, has ordinarily no remedy against an intermediate purchaser who passes the name of some one else as the ultimate purchaser and transferee. (*x*)

But an intermediate jobber may enter into a contract with the vendor through his broker, and in such a case the intermediate jobber will be liable to the vendor for any breach of such contract. (*y*)

Moreover, if the ultimate purchaser is a mere nominee of and trustee for an intermediate purchaser, or for any one else, and the transfer to the ultimate purchaser is never <sup>Cestui que trust of transferee.</sup>

(*s*) *Stewart v. Cauty*, 8 M. W. 160. See, also, *Field v. Lelean*, 6 H. & N. 617, where evidence of a custom among mining sharebrokers to pay on delivery was held admissible upon the question of reasonable time. In this case both the plaintiff and the defendant were mining sharebrokers.

(*t*) See Lord Blackburn's judgment in *Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

(*u*) See, however, Lord Blackburn's judgment in *Maxted v. Paine*, L. R. 6 Ex. 167-8.

(*x*) *Torrington v. Lowe*, L. R. 4 C. P. 26. Compare *Castellan v. Hobson*, 10 Eq. 47.

(*y*) As in *Allen v. Graves*, L. R. 5 Q. B. 478, where there was a special arrangement between the plaintiff's broker and the defendant, an intermediate jobber.

registered, but the vendor continues the legal owner of the shares, and incurs liability in consequence, he is entitled to be indemnified against that loss by the person in whom the beneficial interest of the shares is really vested. (z) This liability arises not out of any contract between the legal and beneficial owners; but from the relation of trustee and *cestui que* trust which exists between them; and from the principle that the interposition of intermediate trustees does not affect the rights of the legal and true equitable owner. Upon this principle it was held in *Brown v. Black* (a), that a vendor

*Brown v.*  
*Black.*

\*729 of shares who had transferred them to an infant, but whom he did not know to be \*such, was entitled to be indemnified by the real purchasers

who had used the infant's name, although the infant had been registered in respect of the shares for two years. His infancy was discovered on the winding up of the company; and, the transfer to him being invalid, the transferrer became a contributory in his place, and then successfully claimed indemnity from the real owners of the shares. (b)

For convenience of reference, the following analysis of the decisions, referred to in the preceding pages upon the rights of vendors, is appended:—

#### I. Vendor against jobber.

##### 1. Successful actions and suits.

###### (a) Actions at law.

*Maxted v. Paine*, No. 1, L. R. 4 Ex. 81.

*Allen v. Graves*, L. R. 5 Q. B. 478.

In both of these the transferee was objected to.

###### (b) Suits in equity.

*Merry v. Nickalls*, L. R. 7 H. L. 530; 7 Ch. 733.

Transferee an infant.

*Cruse v. Paine*, 6 Eq. 641, and 4 Ch. 441.

Registration guaranteed.

##### 2. Unsuccessful actions and suits.

###### (a) Actions at law.

*Grissell v. Bristowe*, L. R. 4 C. P. 36.

*Maxted v. Paine*, No. 2, L. R. 6 Ex. 132.

In both of these the transferee had accepted the transfer.

###### (b) Suits in equity.

*Coles v. Bristowe*, 4 Ch. 3.

Transferee had accepted the transfer.

(z) *Castellan v. Hobson*, 10 Eq. 47.

(a) 8 Ch. 939 and 15 Eq. 363.

(b) Compare *Maynard v. Eaton*, 9 Ch.

mise effected between the plaintiff and the infant was held fatal to the plaintiff's claim.

414, a similar case, but where a compro-

Rennie *v.* Morris, 13 Eq. 203.

Transferee an infant; overruled by Merry *v.* Nickalls, 7 Ch. 733, and L. R. 7 H. L. 530.

## II. Vendor against ultimate purchaser.

### 1. Successful actions and suits.

#### (a) Actions at law.

Bowring *v.* Shepherd, L. R. 6 Q. B. 309.

Davis *v.* Haycock, L. R. 4 Ex. 373.

Walker *v.* Bartlett, 18 C. B. 845.

Humble *v.* Langston, 7 M. & W. 517.

Kellogg *v.* Enthoven, L. R. 8 Q. B. 458 and 9 Q. B. 241.

Where the purchaser had himself transferred the shares.

#### \*(b) Suits in equity.

Wynne *v.* Price, 3 DeG. & Sm. 310.

Paine *v.* Hutchinson, 3 Eq. 257, and 3 Ch. 388.

Shepherd *v.* Gillespie, 5 Eq. 293.

Sheppard *v.* Murphy, Ir. Rep. 2 Eq. 544, and 16 W. R. 943.

Hawkins *v.* Maltby, 6 Eq. 505, and 4 Ch. 200.

Holmes *v.* Symons, 13 Eq. 66.

In none of these cases was the transfer executed by the transferee

Evans *v.* Wood, 5 E. 9.

Hodgkinson *v.* Kelly, 6 Eq. 496.

In both of which the company had stopped.

### 2. Unsuccessful suits.

Hawkins *v.* Maltby, 3 Ch. 188, reversing S. C. 4 Eq. 572.

The case on appeal turned on the pleadings,

Birmingham *v.* Sheridan, 33 Beav. 660.

Not now to be relied upon. See *ante*, p. 725, note (m).

## III. Vendor against *cestui que* trust of transferee.

### (a) Successful suits.

Castellan *v.* Hobson, 10 Eq. 47.

Nickalls *v.* Furneaux, 4 W. N. 118.

Brown *v.* Black, 15 Eq. 363 and 8 Ch. 939.

Transfer to an infant.

### (b) Unsuccessful suit.

Maynard *v.* Eaton, 9 Ch. 414.

Compromise with transferee held to be a defense.

#### 4. As to the position of the real vendor and purchaser as regards their respective brokers.

The duty of a broker employed to sell is to sell according to his instructions if he can do so, and if he cannot, not to sell at all. His duty is performed when he has entered into a binding contract for sale, and has given the name of the buyer to his employer. If the selling broker receives the price, it

Duty of selling broker.

is his duty to hand it over to his principal; but it is no part of a selling broker's legal duty to his employer to procure payment of the price, nor to procure the execution by the purchaser of the transfer, nor to procure the registration thereof. (c) Nor has it yet been decided that it is part of his duty to inquire into the solvency of the transferee. (d) As between the vendor and his own broker, the sale is effected by the contract to sell, although the vendor may refuse to carry it out. (e)

Again, the duty of a broker employed to buy is to buy according to his instructions if he can; and if he cannot, not to buy at all. He has no implied authority to enlarge the time for completing the purchase when that time has once been fixed; in other words, he has no implied authority to continue the account. (f)

A broker instructed to buy shares of a particular kind, fulfills his instructions if he buys what are commonly bought and sold as such shares in the share market. Thus, where a broker was instructed to buy "Kentish Coast Railway Scrip," and he bought what was known as such, and was paid for it, it was held, that he was not liable to refund the money he had received, although it turned out that what he had bought was scrip issued without due authority, and was in fact utterly worthless (g). Upon the same principle, if a broker is told to buy shares and he buys scrip; if nothing but scrip has found its way into the market, and if such scrip has been usually bought and sold as shares, and if there is nothing to show that the broker was to wait until shares were issued, he will be held to have pursued his authority. (h)

Until the broker has acted upon his authority to buy, it may be revoked; and if any money has been given him in order to enable him to pay for them, it may be demanded back (i). But this cannot be done after he has entered into a contract for purchase, and become personally responsible for the due performance of that contract. (k)

(c) Booth v. Fielding, 1 W. N. 245, and see Clark's Law of Joint Stock Companies (Scotch), 145.

(d) See, on this subject, Lord Blackburn's judgment in Maxted v. Paine, No. 2, L. R. 6 Ex. 132.

(e) Ross v. Moses, 1 C. B. 227.

(f) See Maxted v. Paine, L. R. 4 Ex.

81.

(g) Lamert v. Heath, 15 M. & W. 486.

(h) Mitchell v. Newhall, 15 M. & W. 308.

(i) Fletcher v. Marshall, 15 M. & W. 755,

(k) McEwen v. Woods, 11 Q. B. 13.

On the other hand, a person who employs a broker to buy or sell is bound to indemnify him against any losses which he may incur by reason of his having contracted in his own behalf, and of being afterwards, without any default of his own, unable

\*duly to complete his contract. (*l*) The following cases will serve to illustrate this doctrine. \*732 Right of broker to indemnity.

1. Where a broker is employed to sell.

In *Sutton v. Tatham* (*m*), a person ordered a broker to sell for him 250 shares. The broker entered into a contract for their sale, and was afterwards informed that a mistake had been made, and that fifty only were intended to be sold. The broker not being enabled to deliver the shares which he had agreed to sell, was compelled to make good to the purchaser the difference between the price agreed upon, and the price at which the purchaser had procured shares elsewhere. It was held, that the broker was entitled to recover this difference from his employer. Sales through brokers.  
*Sutton v. Tatham.*

In *Bayliffe v. Butterworth* (*n*), the defendant instructed the plaintiff, a broker, to sell shares for him, which the plaintiff accordingly did. When the time came for the delivery of the shares to the purchaser, the defendant made default, and did not furnish them. The plaintiff having been compelled by the rules of the Stock Exchange to pay the difference between the price agreed to be paid by the purchaser, and that actually paid by him for other shares, was held entitled to recover such difference from the defendant. Bayliffe v. Butterworth.

2. Where a broker is employed to buy.

In *Bayley v. Wilkins* (*o*), the defendant requested the plaintiff, a broker, to buy shares for him, which the plaintiff accordingly did. At the time of their purchase, a call had been made, but such call had not become payable. The plaintiff paid the amount of the call to the selling broker in pursuance of the rules of the Stock Exchange, and was Purchases through brokers.  
*Bayley v. Wilkins.*

(*l*) See, in addition to the cases cited, *infra*, *Young v. Cole*, 3 Bing. N. C. 724; *Child v. Morley*, 8 T. R. 610; *Bowlby v. Bell*, 3 C. B. 284; *Simpson v. Rand*, 1 Ex. 688. As to indemnifying one's broker against the costs of an action brought against him, see *Brown v. Hall*, 7 C. B. N. S. 503.

(*m*) 10 A. & E. 27.

(*n*) 1 Ex. 425. Compare this with *Bowlby v. Bell*, 3 C. B. 284.

(*o*) 7 C. B. 886. See, as to the evidence to be adduced by a broker who seeks to recover a call paid by him, *McEwen v. Woods*, 2 Car. and K. 330.

held entitled to recover the money so paid from the defendant.

In *Taylor v. Stray* (*p*), the defendant instructed the plaintiff, \*a broker to buy some Royal British Bank shares for him. The defendant accordingly bought the shares, which were to be paid for on a future day. Before that day arrived, the bank stopped payment, and the defendant refused to take or pay for the shares. The plaintiff thereupon paid for them in compliance with the rules of the Stock Exchange; and he was held entitled to recover the money so paid from the defendant.

In *Pollock v. Stables* (*q*), the plaintiff, in pursuance of the defendant's instructions, bought shares for him, which the defendant neglected to take up. The broker who sold them, consequently re-sold them, and thereby a loss was sustained. The plaintiff, who was also a broker, made good this loss, as he was compellable to do by the rules of the Stock Exchange, and he was held entitled to recover the amount he had paid from the defendant.

In *Lacey v. Hill* (*r*), brokers bought stock for a customer, who suddenly died insolvent; they having paid for the stock were held entitled to re-sell it and to prove against his estate for the loss they sustained.

But a broker is not entitled to indemnity from his employer in respect of loss arising from his own default. Thus in *Duncan v. Hill* (*s*), the plaintiffs, who were brokers on the Stock Exchange, were instructed by the defendant to buy shares for a certain account, and afterwards to continue it. This was done; but before the final settling day arrived the brokers were declared defaulters, and according to the rules of the Stock Exchange all their transactions were peremptorily closed. The brokers were held entitled to be repaid moneys paid by them in order to keep open the account at the defendant's request, but not those further sums which had become payable by reason of their own insolvency. (*t*)

(*p*) 2 C. B. N. S. 175. See, too, *Stray v. Russell*, 1 E. & E. 888; *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Biederman v. Stone*, ib. 504. The last two cases show that the broker's right is not affected by § 153 of the Companies act, 1862. See, further as to the right of purchasing brokers to indemnity from their employers, *Mollett v. Rob-*

*inson*, L. R. 7 H. L. 802; 7 C. P. 84, and 5 C. P. 646.

(*q*) 12 Q. B. 765.

(*r*) *Lacey v. Hill*, Scrimgeour's claim 8 Ch. 921. See ib. Crowley's claim, 18 Eq. 182.

(*s*) L. R. 8 Ex. 242, reversing S. C. 6 Ex. 255.

(*t*) Compare *Lacey v. Hill*, Crowley's

\*The cases above referred to establish as a general doctrine that what a broker, employed in buying and selling shares for another person, is compelled by the rules of the Stock Exchange to pay, in consequence of the non-performance by his employer of the contract entered into on his behalf, is recoverable from him by the broker. The principle of the decisions in question does not however extend farther than this, viz., that brokers are impliedly authorized by those who employ them, to do what is usual and customary amongst brokers in matters such as those they are employed about. The cases which have been noticed do not show that persons who employ members of the Stock Exchange are affected by the rules of the Exchange without reference to the question of what is customary amongst its members; and in truth, to non-members, such rules are only important so far as they evidence usage. This is shown by the case of *Westropp v. Solomon*. (u) There, the defendant employed the plaintiff, a broker, to sell ten scrip certificates, which the plaintiff did. It afterwards appeared that these certificates were forgeries, although neither the plaintiff nor the defendant had any suspicion that such was the case. The committee of the Stock Exchange made a rule to the effect that the purchasers of the spurious scrip should have a right to demand from the sellers not only repayment of the purchase-money, but also payment of an additional fixed sum. In compliance with this rule, the plaintiff repaid to the purchaser the money received from him, and also the additional sum fixed by the rule; but it was held that the plaintiff was only entitled to recover from the defendant the money which the purchaser himself could have recovered at law; namely the amount paid by him with interest; and it was held, that the rule, having been made after the sale, formed no part of that usage of brokers by which the defendant was bound.

Rules of Stock Exchange as distinguished from usage of brokers.

After-made rules.  
*Westropp v. Solomon*.

Accounts sent in by sharebrokers to their employers may be shown not to have included charges which ought to have been included; and this is true even where the person to whom such accounts are sent have dealt with other people upon the faith of the accounts being full and correct. (x)

\*735 Brokers' charges.

claim, 18 Eq. 182, where the brokers became defaulters solely by reason of the previous default of their principal.

(u) 8 C. B. 345. See, also, *Sweeting v. Pearce*, 7 C. B. N. S. 449, and 9 ib. 534.  
(x) *Dails v. Lloyd*, 12 Q. B. 531.

A broker employed to buy or sell shares in an illegal company, or in a company which by law is not in a position to issue shares, cannot recover from his employer either any commission on the purchase or sale, or any money expended for him on account of such shares. (y)

## SECTION VII.—OF THE RELINQUISHMENT OF SHARES AND OF THE RIGHT TO RETIRE.

Subject to a qualification which will be presently mentioned, a member of an ordinary firm can surrender his share and interest in the firm to his co-partners, or any of them, upon any terms to which he and they may agree. But there is only one method by which a partner can retire from a firm without the consent of his co-partners, and that is, by dissolving the firm. In order to avoid the necessity of a general dissolution when a partner may wish to retire, special provisions are frequently introduced into partnership articles; but it is not unfrequently found that, owing to unforeseen circumstances, these provisions cannot be carried into effect; and when that is the case, a dissolution, with its usual consequences, must take place if a partner is to retire otherwise than by the consent of his co-partners. (z)

The qualification above alluded to, has relation to a partner's retirement from an insolvent firm. A partner desirous of retiring from an insolvent firm, is at perfect liberty to sell his interest in it for any sum the continuing partners think proper to give him; and a sale by him to them cannot be set aside or impeached as a fraud upon the creditors of the firm unless there be clear evidence *aliunde* of such fraud. (a)

At the same time, the present share of a partner in an insolvent

(y) *Josephs v. Pebrer*, 3 B. & Cr. 639; *Ex parte Neilson*, 3 DeG. M. & G. 556. See, further, as to illegal sales through brokers, *Buck v. Buck*, 1 Camp. 547; and *Bousfield v. Wilson*, 16 M. & W. 185, both of which have been noticed already. See *ante*, p. 198.

(z) See *Cook v. Collingridge*, Jac. 607; *Kershaw v. Matthews*, 2 Russ. 62; *Madg-*

*wick v. Wimble*, 6 Beav. 495; *Downs v. Collins*, 6 Ha. 418. Compare *Simmons v. Leonard*, 3 Ha. 581; *Pettyt v. Jane-son*, 6 Madd. 146.

(a) See *Ex parte Peake*, 1 Madd. 346; *Parker v. Ramsbottom*, 3 B. & C. 257; *Ex parte Birch*, 2 Ves. J. 260, note; *Ex parte Carpenter*, Mont. & McAr. 1.

firm (*b*) is obviously less than nothing, whatever may be the amount of the capital brought in by him. Consequently a partner who retires from an insolvent firm and withdraws from it a sum of money which he is pleased to call his share, is defrauding the creditors of the firm; and such a transaction cannot stand, and may be impeached by the trustee in bankruptcy of the continuing firm. (*c*) To proceedings instituted by the trustee to impeach such a transaction, it is no answer to say, that the bankrupts themselves were bound by it; for the trustee represents the creditors, and can impeach any transaction which is a fraud as against them, although the bankrupts themselves might not be in a position to do so. (*d*) Upon similar grounds, if a partner relinquishes his share in a partnership to his co-partners, upon such terms and under such circumstances as to render that relinquishment a fraud upon his creditors, and he then becomes bankrupt, his trustee will be entitled to rescind the transaction.

Laying aside, however, all such considerations as General rule as to retiring. these, it may be said—

1. That it is competent for a partner to retire with the consent of his co-partners at any time and upon any terms;

2. That it is competent for him to retire without their consent by dissolving the firm, if he is in a position to dissolve it.

3. That it is not competent for a partner to retire from a partnership which he cannot dissolve, and from which his co-partners are not willing that he should retire.

Similar principles apply to the retirement of shareholders from companies; except that retirement by a transfer of shares \*is always contemplated and provided \*737 Retirement from companies. for when companies are formed. This mode of retiring has been already considered. With respect to retirement by a relinquishment and surrender of shares, if such a method of withdrawing from the company is authorized by its constitution, a surrender by a shareholder of his shares will of course be valid, if all the formalities which may be necessary are duly complied with; and where the power to surrender exists, the due observance of all

(*b*) An insolvent firm is one in which the joint assets are less than the joint liabilities. Such a firm is insolvent whatever the wealth of the individual partners composing it may be, see *Mont. & McAr.* p. 5.

(*c*) See *Anderson v. Maltby*, 4 Bro. C. C. 423, and 2 Ves. J. 244; *Re Kemptoner*, 8 Eq. 286; and *ante*, p. 658.

(*d*) *Ib.* 2 Ves. J. 655, and see *Billiter v. Young*, 6 E. & B. 40; *Tyrrell v. Hope*, 2 Atk. 562.

necessary formalities will be presumed in favor of every *bona fide* retiring shareholder. (*e*)

The Companies clauses consolidation act, 1845, contains no provision authorizing the surrender of shares. But by the Companies clauses act, 1863 (*f*) (which applies to all companies which have a special act of Parliament incorporating that act), it is enacted (§ 9) that "the company may from time to time accept, on such terms as they think fit, surrenders of any shares which have not been fully paid up;" and (§ 10) that "the company shall not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of any share."

Neither the Companies act, 1862, nor the regulations in Table A. to that act, authorize the retirement of a member by surrendering his shares to the company; and the effect of a surrender of shares, unless it be in exchange for others, is to diminish the capital of the company. Nevertheless, it has been held that the holder of unpaid-up shares in a company registered with limited liability, can surrender his shares without first paying them up in full if the articles as originally framed or as altered by special resolution (*g*) authorize such a surrender. (*h*) The power to surrender has been regarded as open to no more objection on the ground that it reduces the capital than a power to forfeit, the legality of which is unquestioned. (*i*) A power to forfeit, however, is only operative \*where a shareholder cannot or will not pay up his calls, and is far less open to abuse in order to reduce capital than a power to surrender; and notwithstanding the decisions supporting the validity of a power to surrender, it has been decided that a special resolution authorizing directors to apply a company's money in buying up the shares of such shareholders as may choose to surrender them, is invalid. (*k*.)

The right of a shareholder in a cost-book mining company to retire from the company upon the relinquishment of his shares, and payment of what may be due from him to

(*e*) See Lane's case, 1 DeG. J. & Sm. 504.

(*f*) 26 & 27 Vict. c. 118.

(*g*) Teasdale's case, 9 Ch. 54, where, however, the effect of all the resolutions taken together was to increase the unpaid-up capital.

(*h*) Ibid; Marshall v. Glamorgan Iron

Co. 7 Eq. 129; and see Wright's case, 12 Eq. 336, note; Snell's case, 5 Ch. 22.

(*i*) Table A. expressly allows this. See the next section.

(*k*) Hope v. International Financial Society, 4 Ch. D. 327, which compare with Teasdale's case, *ante*, note (*g*).

the company, is established by custom, and is therefore imported into the contract by which the members of such companies are mutually bound (*l*); and where it was proved to be the practice of a cost-book company to allow shareholders to retire upon any terms agreed upon at general meetings, it was held that a shareholder who had been allowed at a general meeting to surrender his shares without paying the arrears of calls upon them, had ceased to be a shareholder. (*m*) The surrender must be by notice in writing to the purser. (*n*)

The retirement of a shareholder by surrendering his shares, is, however, not one of those matters as to which a majority of members binds a minority, or as to which directors have any implied authority to represent the company. Both principle and authority are clearly opposed to any such doctrine. (*o*) Nor if directors have power to accept a surrender of shares can they delegate this power to a manager. (*p*) At the same time if shares have been surrendered with the knowledge of all the shareholders under circumstances fully disclosed to them all, and such surrender has not been questioned for a considerable period, the company will be precluded from afterwards disputing the validity of the surrender. (*q*) \*739 The following are the leading authorities upon this subject:—

Morgan's case. (*r*) The company's deed authorized the directors to buy up, out of certain specified funds of the company, any shares which might be offered for sale. An

Power of majority to bind minority with reference to the relinquishment of shares.

Morgan's case.

(*l*) See, as to this, *Ex parte Palmer*, 7 Ch. 286; *Fenn's case*, 4 DeG. M. & G. 285, and 1 Sm. & G. 26; *Bodmin United Mines*, 23 Beav. 370; *Birch's case*, 2 DeG. & J. 10; *Lofthouse's case*, ib. 69; *Northey v. Johnson*, 19 L. T. 104.

(*m*) *Bodmin United Mines*, 23 Beav. 370.

(*n*) 32 & 33 Vict. c. 19, §§ 21-23.

(*o*) *The Plate Glass, &c. Co. v. Sunley*, 8 E. & B. 47, is not inconsistent with this nor with the cases referred to in the text; in that case the demurrer admitted that the company had accepted the surrender of the shares then in question.

(*p*) *Cartmell's case*, 9 Ch. 691.

(*q*) As in *Brotherhood's case*, 31 Beav. 365, and 4 DeG. F. & J. 566; noticed *infra*, p. 743, and *Hunt's case*, 32 Beav. 387. Implied notice to the directors of the company through the books of the company is not enough. *Cartmell's case*, 9 Ch. 691, where the directors had power to accept surrenders. See, as to estopped by conduct, *ante*, p. 128, *et seq.*

(*r*) 1 DeG. & S. 750, and 1 Mac. & G. 225. *Richmond's Executors' case*, 3 DeG. & Sm. 96, and *Lawes' case*, 1 DeG. M. & G. 421, where similar decisions with respect to other shareholders in the same company. Compare *Kent v. Jackson*, 14 Beav. 367, and 2 DeG. M. & G. 49.

extraordinary general meeting resolved that if any shareholder should be desirous of withdrawing from the company, the directors should be at liberty to purchase his shares upon certain specified terms. A shareholder acted upon this resolution, complied with the terms, and sold his shares to the company. But it was held that the resolution was not binding on the company; and that the shareholder in question was properly made a contributory, although nearly five years had elapsed since his withdrawal.

Stanhope's case. (s) The directors had power generally to act as might appear to them best for the interest of the company. A dispute arose amongst them, and one of them retired, and his shares were surrendered and cancelled. It was held that his retirement was unauthorized, and he was put on the list of contributories ten years after his shares had been cancelled.

Munt's case. (t) The directors of a company, disagreeing as to the mode of managing its affairs, and being divided into two parties, it was resolved that one of the two parties should retire, and that the other should take the management of the company and relieve the first from their liabilities. The directors composing one of the two parties did accordingly retire, and relinquish their shares in favor of the company; but it was held that their retirement was altogether unauthorized and invalid, and that they were contributories on the winding up of the company.

The principles laid down in these cases were very much considered in the course of winding up the Agriculturist Cattle Insurance Company. Cattle Insurance Company. The company was formed in 1845. In 1848 it had got into difficulties, and several shareholders wished to retire. This they could not do consistently with the company's deed of settlement. An arrangement, however, was made in November, 1848, under resolutions passed at a meeting of shareholders specially convened for the purpose, to the effect that a call of 4*l.* per share should be made, and that those share-

(s) 3 DeG. & S. 198. See, too, Daniell's case, 22 Beav. 43, affirmed 3 Jur. N. S. 803; Walter's case, 3 DeG. & S. 244; Holt's case, 1 Sim. N. S. 389; and compare Cockburn's case, 4 DeG. & S. 177, and Busk's case, 3 ib. 267, and observe the larger powers of the

directors in the first, and the adoption of their acts in the last, of these two cases.

(t) 22 Beav. 55. See, too, Bennett's case, 18 Beav. 339, and 5 DeG. M. & G. 284; Richmond's case, and Painter's case, 4 K. & J. 305.

holders who wished to retire should, on a particular day, pay part only of the call, and that their shares should be forfeited for non-payment of the rest. Under this arrangement many persons retired at once; many, however, remained, and of those some retired afterwards under various arrangements made between themselves and the directors. In 1861 the company was ordered to be wound up, and in the course of such winding up it was held—1. That having regard to the publicity and *bonâ fides* of the arrangement come to in November, 1848, and to the time which had since elapsed, the validity of the retirement of those shareholders who withdrew in pursuance of that arrangement could not be disputed, and that those persons therefore were not liable to be placed on the list of contributories (*u*); 2. That those persons who retired afterwards by arrangement with the directors, but without the knowledge of the other shareholders, were to be treated as shareholders still, and were liable to be placed on the list, although twelve years had elapsed since their retirement and the winding-up order. (*x*)

Brotherhood's case.

Smallcombe's case.

Spackman's case.

Houldsworth's case.

\*Moreover, where persons have only agreed to take shares, and have not become actual shareholders, the directors have no implied power to release them from their agreement (*y*). Nevertheless, an express power to accept a surrender of shares, or to rescind and abandon contracts, has been held to apply to contracts to take shares and to authorize a release of a person from his agreement to become a member. (*z*)

The foregoing decisions sufficiently establish the doctrine that in the absence of a special authority enabling them so to do, directors have no power to bind the company by buying each other out; nor by buying out shareholders; nor by accepting the surrender or relinquishment of shares to the company. (*a*) Moreover, if the directors of a company mis-

Directors have no power to buy out shareholders.

(*u*) *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Brotherhood's case*, 31 Beav. 365, affirmed 4 DeG. F. & J. 566.

(*x*) *Spackman v. Evans*, L. R. 3 H. L. 171; *Houldsworth v. Evans*, ib. 263; *Stanhope's case*, 1 Ch. 161; *Stewart's case*, ib. 511. See, on these cases, the note *infra*, p. 743.

(*y*) *Hall's case*, 5 Ch. 707; *Adam's*

case, 13 Eq. 474.

(*z*) *Snell's case*, 5 Ch. 22; *Thomas case*, 13 Eq. 437.

(*a*) See, further, *London and Provincial Coal Co.* 5 Ch. D. 525; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Harris v. North Devon Rail. Co.* 20 Beav. 384; *Walker's case*, 2 Jur. N. S. 1216, L. J.; *Playfair v. Birmingham*,

apply its funds by buying up shares in the company, they are compellable to make good to the company the money so expended, with interest. (*b*)

It is necessary, however, to distinguish the retirement of a shareholder from the refusal of a person to be a shareholder in a concern which he never agreed to join (*c*); and it has very properly been held that the principle of the above decisions does not apply to the case of a person who, having taken shares in a company formed for given objects, relinquishes such shares and retires from the company, upon a change being made in those objects without his consent. (*d*) So, if it is doubtful whether a person ever was a shareholder or not, an agreement releasing him from all liability, if any, may be validly made, so as to bind the company (*e*); and an allotment of shares made pursuant to an invalid resolution may be properly cancelled at all events before the shares are registered in the name of the allottee. (*f*) But a general power to compromise does not authorize an agreement to allow a shareholder to retire when there is no dispute as to his membership, and where there is no power to buy or accept a surrender of shares. (*g*)

It is further necessary to distinguish the retirement of a shareholder by relinquishing his shares to the company, from his retirement by transferring his shares to some or one of the directors of the company upon their own individual account. For whilst, in the absence of

Surrender of shares to company compared with a transfer of them to the directors.

Bristol, &c. Co. 1 Ra. Ca. 640; *Hodgkinson v. National Live Stock Insur. Co.* 26 Beav. 473, and 4 DeG. & J. 422; *Burt v. British National Co.* 4 DeG. & J. 153; *Paul and Beresford's case*, 10 Jur. N. S. 692, M. R.

(*b*) *Evans v. Coventry*, 8 DeG. M. & G. 835. See decree, par. 4, varying pars. 5 and 6 of the decree in the court below.

(*c*) See *Pim's case*, 3 DeG. & S. 11, and 1 Mac. & G. 291; *Henessy's case*, 2 Mac. & G. 201, and 3 DeG. & S. 191, as to placing shares in a person's name without authority.

(*d*) *Meyer's case*, 16 Beav. 383.

(*e*) *Lord Belhaven's case*, 3 DeG. J. &

*Sm.* 41; *Dixon's case*, L. R. 5 H. L. 606, reversing 5 Ch. 79. See, also, *Wright's case*, 7 Ch. 55, reversing S. C. 12 Eq. 331 *Fox's case*, 5 Eq. 118.

(*f*) *Barnett's case*, 18 Eq. 507.

(*g*) See, L. R. 3 H. L. 183, 231; *Adam's case*, 13 Eq. 474; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Dixon's case*, 5 Ch. 79, was decided on the principle that there is no dispute, and although the House of Lords reversed the decision, see L. R. 5 H. L. 606, the principle of *L. J. Giffard's decision* is unquestionable. *Comp. Wright's case*, 7 Ch. 55.

special authority, it is not competent for directors to accept on behalf of a company the surrender of shares held in the company, it is as competent for the directors of a company, as for anybody else, to accept shares in the company from such shareholders as may be willing to transfer them in the ordinary way. Consequently, an agreement between the directors and some of the shareholders of a company to the effect that the latter shall relinquish their shares and transfer them to the directors, is not *ultra vires*, or in any way illegal, if the agreement is with the directors as individuals, and not with them as representing the company. (*h*) Upon the same principle, if a shareholder transfers his shares to a director or to an ordinary individual, and without notice that the director is acting on behalf of the company, the transferrer does effectually retire from the company; although had he known that he was in fact surrendering his shares to the company, the surrender would have been invalid. (*i*)

Moreover directors who individually agree to accept a \*surrender of shares and to indemnify the surrenderer against \*743 calls, are personally bound by their agreement, whether it is, as regards the company, *ultra vires* or not. (*k*)

#### NOTE ON SMALLCOMBE'S CASE, SPACKMAN'S CASE, AND HOULDSWORTH'S CASE, REFERRED TO ABOVE, P. 740.

Smallcombe retired in strict accordance with the arrangement come to in 1848.

Houldsworth retired pursuant to the same arrangement, with this exception, that he did not retire within the time fixed thereby, but shortly afterwards; the time having been extended by the directors.

Spackman retired pursuant to another agreement altogether, come to between him and the directors for compromising litigation between him and the company.

The House of Lords held,—

1. That the arrangement of 1848 was one by which a majority of shareholders could not bind a minority.
2. That, nevertheless, the minority might be precluded from disputing it.
3. That *all* the shareholders must be treated as having had notice of it, and that as they had allowed it to be carried out, and had not disputed its validity for many years, they were *all* precluded from disputing it.
4. That consequently Smallcombe was not a contributory, (*l*)
5. That the agreement with Houldsworth differed in an essential particular from the

(*h*) *Haddon v. Ayres*, 1 E. & E. 118. See, too, *Jessopp's case*, 2 DeG. & J. 638. In *Cartmell's case*, 9 Ch. 691, the directors never assented to the transfer made to them.

(*i*) See *Hollway's case*, 1 DeG. & S.

777; *Bagge's case*, 13 Beav. 162; *Ex parte Nicol*, 3 DeG. & J. 387.

(*k*) *Barker v. Allan*, 5 H. & N. 61.

(*l*) *Brotherhood's case*, 31 Beav. 365, affirmed 4 DeG. F. & J. 566, was like *Smallcombe's*.

arrangement of 1848, and was one which the directors had no power to enter into.

6. That *all* the shareholders could not be treated as having had sufficient notice of the agreement with him to preclude them from disputing it, even after the lapse of many years.

7. That consequently Houldsworth, or he being dead, his executors, were contributories.

8. That the agreement with Spackman was one which the directors had no power to make.

9. That *all* the shareholders could not be treated as having had sufficient notice of it to preclude them from disputing it, even after the lapse of many years.

10. That he therefore was also a contributory. (*m*)

The Lords were by no means unanimous in their decision, and Lord St. Leonards, in a judgment which the writer ventures to think ought to have prevailed with the House, gave his opinion, that in all three cases the company ought to be held precluded from disputing transactions so long passed as those in question, and all of which were perfectly *bond fide*. The same view was taken by Lord Romilly

744\* when the cases were before him (see 1 Ch. 163). As the decisions stand, however, they are extremely difficult to \*reconcile on satisfactory grounds; for the notice which the shareholders had in Houldsworth's and Spackman's cases was little if at all less full than the notice they had in Smallcombe's case. Some general principles of value, however, can be extracted from these three cases. They show—

1. That a company will be precluded from disputing the validity of transactions sanctioned by a general meeting, but not binding on absentees, if such transactions are *bond fide*, and such as all the shareholders, if *sui juris*, could sanction, and if it can be inferred that all the shareholders were informed of them, and if no steps have been taken for a considerable time to impeach them.

2. That information on the part of all the shareholders, sufficient for the purpose in question, must be inferred from notices sent to them all, in the usual way, telling them what has been done; but not from reports, &c., not distinctly giving them this information.

3. That powers of compromise and powers of forfeiture must be *bond fide* exercised for the purposes for which they are conferred, and that attempts to make them available for other purposes will not succeed.

This view of their joint effect is supported by *Phosphate of Lime. Co. v. Green*, L. R. 7 C. P. 43, where the Court of Common Pleas held that a company had ratified a purchase of shares which the directors had no power to make.

## SECTION VIII.—OF THE FORFEITURE OF SHARES AND OF THE RIGHT TO EXPEL.

In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any other member. Nor, in the

Right to expel  
a partner.

(*m*) Stanhope's case, 1 Ch. 161, was like Spackman's.

absence of express agreement, can any of the members of an ordinary partnership forfeit the share of any other member, or compel him to quit the firm on taking what is due to him.<sup>1</sup> As there is no method except a dissolution, by which a partner can retire against the will of his co-partners, so there is no method except a dissolution by which one partner can be got rid of against his own will. (n)

The consequence of this is, that when partners disagree and cannot dissolve except with the concurrence of all, it is not unusual for some of them so to conduct themselves Driving a partner to a dissolution. towards another, as, if possible, to drive him to agree to a dissolution. \*But it need hardly be said that a scheme of \*745 this kind will, if possible, be frustrated; and redress may be obtained in such a case without dissolving the partnership. (o)

With a view to facilitate the removal of a partner who misconducts himself, it is not unfrequently agreed that a power to expel shall be exercisable in certain events Exercise of powers of expulsion. and under certain restrictions. These expulsion clauses, as they are termed, will be alluded to hereafter in the chapter on the construction of partnership agreements; but it may be observed in

<sup>1</sup>The mere failure of one partner to pay his share of the debts or expenses does not forfeit his right to the common property. *Kimball v. Gearhart*, 12 Cal. 27.

A partner, by failing to contribute his share of the partnership fund, does not, in ordinary cases, forfeit the interest which he already has in the firm, especially where no extraordinary emergency exists requiring it. *Piatt v. Oliver*, 3 McLean, 27.

An association or partnership cannot exclude or expel a member for refusing to do an act not required by the constitution or laws when he joined, and entirely foreign to the purposes of the association. *Gorman v. Russell*, 14 Cal. 531.

Where personal property belongs to the members of a voluntary unincorporated association, especially for public, and not for private purposes, if a member abandon the association, he thereby abandons his interest in such property, and those who remain are entitled to such interest. *Curtiss v. Hoyt*, 19 Conn.

154.

An agreement in co-partnership articles provided that after each partner had provided the sums of money stipulated in the articles, any further sums required should be raised by joint efforts and on the partners' joint credit; and further, that the party violating the agreement should forfeit thereby his interest in the concern, at the option of the other party, and be ejected from the firm, the other partner refunding to him the sum he advanced: *Held*, that the mere fact that the joint responsibility of the firm was insufficient to raise the requisite funds, gave one partner no right to declare the share of the other forfeited. *Patterson v. Silliman*, 28 Pa. St. 304.

(n) See *Hart v. Clarke* 6 DeG. M. & G. 232, and on appeal, *Clarke v. Hart*, 6 H. L. C. 633; *Crawshay v. Collins*, 15 Ves. 226; *Featherstonhaugh v. Fenwick*, 17 ib. 309.

(o) See *Fairthorne v. Weston*, 3 Ha. 387.

passing, that such clauses are always construed strictly, and that no expulsion under them will be effectual unless the expelling partners have acted with perfect good faith. (*p*)

Companies have no power to forfeit the shares of their members, or of subscribers who have not yet become members, unless such power is specially conferred upon them. (*q*)  
Right of companies to forfeit shares. A clause in a company's articles enabling the directors to forfeit the shares of any member who shall take any legal proceedings against the company is invalid. (*q'*)

The right to forfeit shares is frequently arrogated in cases where a shareholder will not pay to the company what is due to it from him in respect of his shares; and it is not uncommonly assumed that a right to forfeit in such a case is possessed as a matter of course by directors. But this opinion is erroneous; for, as already stated, a right to forfeit exists only when specially conferred; and even a majority of shareholders cannot confer it unless empowered so to do by the company's act, charter, deed of settlement, or regulations. (*s*) But if there is power to forfeit for non-payment of calls, that power may be extended to non-payment of additional capital which may be authorized to be raised. (*t*)

By the Stannaries act, 1869, shares in cost-book mining companies can be forfeited for non-payment of calls. (*u*)  
Forfeiture of shares in cost-book companies.

The only other general legislative enactment now in force (*v*), which expressly confers on companies the power of forfeiting the shares of their members, is the Companies consolidation act. The Companies act of  
Statutes authorizing forfeitures of shares.

(*p*) See *Blisset v. Daniel*, 10 Ha. 493; *Wood v. Woad*, L. R. 9 Ex. 190.

(*q*) *Hart v. Clarke*, 6 DeG. M. & G. 232, and 6 H. L. C. 633; *Norman v. Mitchell*, 5 DeG. M. & G. 648; *Barton's case*, 4 Drew. 535. As to companies partly English and partly foreign, see *Ludlow v. Dutch Rhenish Rail. Co.* 21 Beav. 43. As to the right of corporations to disenfranchise and expel members for reasonable cause, see *Grant on Corporations*, 262-269. As to expulsion from a club, see *Hopkinson v. Marquis of Exeter*, 5 Eq. 63.

(*r*) *Hope v. International Financial*

*Society*, 4 Ch. D. 327.

(*s*) *Barton's case*, 4 Drew. 535, affirmed on appeal, 4 DeG. & J. 46.

(*t*) See *Kelk's case*, 9 Eq. 107.

(*u*) 32 & 33 Vict. c. 19, § 16. See, before this act, *Hart v. Clarke*, 6 DeG. M. & G. 232, and 6 H. L. C. 633.

(*v*) The 7 & 8 Vict. c. 113, § 37, provided for forfeiture, but the 7 & 8 Vict. c. 110, did not. Companies governed by this last act usually possessed the right of forfeiting shares under their deed of settlement. A clause in the deed that the shares of subscribers who would not execute it might be forfeited,

1862 does not itself contain any provisions on this subject, but the Table A. to that act does, as will be seen presently. (x)

*As to companies governed by the Companies clauses consolidation act*, it is provided by 8 & 9 Vict. c. 16, §§ 29–35, Forfeiture of shares in companies governed by 8 & 9 Vict. c. 16. that if any shareholder fail to pay any call payable by him, the directors, at any time after the expiration of

two months from the day appointed for the payment of a call, may declare the share in respect of which such call was payable forfeited, whether the call has been sued for or not. But before declaring any share forfeited, the directors must give notice of their intention to do so, twenty-one days at least before making a declaration of forfeiture. After a share has been declared forfeited, it may be sold for payment of the calls in arrear; but before it is so sold, the declaration of its forfeiture must be confirmed, and its sale must be ordered at a general meeting held not sooner than two months after the day on which notice of intention to forfeit was given. If the money arising from the sale of a forfeited share is more than sufficient to pay the arrears of calls with interest, and the expenses of sale, the surplus is to be paid to the defaulting shareholder; and if before a share is sold he pays \*747 what is due upon it and also the expenses, if any, incurred

for the purpose of selling it, then he is entitled to have the share restored to him. The act in question expressly declares that shares may be forfeited for non-payment of Forfeiting and suing for calls calls, whether those calls have been sued for or not. The right to forfeit and the right to sue may consequently both be exercised together; the remedies are cumulative, not alternative. (y)

If the company has a special act also incorporating the Companies clauses act, 1863, the shares when forfeited may be cancelled if they cannot be sold. (z) But this can Cancellation of forfeited shares. only be done by a general meeting, held at least two months after

was valid; *Stewart v. Anglo-Californian Co.* 18 Q. B. 736; *Beresford's case*. 2 Mac. & G. 197, and 3 DeG. & S. 175; *Baily's case*, 15 Jur. 29; but if there was no such clause, no forfeiture could be effected; *Barton's case*, 4 Drew. 535, and on appeal, 4 DeG. & J. 46.

(x) The acts of 1856–58 also left the subject of forfeiture to be dealt with by the regulations of each company.

(y) *Great Northern Rail. Co. v. Kennedy*, 4 Ex. 417; *Inglis v. Great Northern Rail. Co.* 1 Macq. 112. In *Edinburgh, Leith, &c. Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *Giles v. Hutt*, 3 Ex. 18; *London & Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674, there was only an option to sue or to forfeit.

(z) 26 & 27 Vict. c. 118, § 4.

notice of the forfeiture (*a*), and the shares may be redeemed by payment of what is due in respect of them before they have been cancelled. (*b*) Even such cancellation, however, does not release the shareholder from his liability to pay what may be due from him at the time of cancellation (*c*); although if he is afterwards sued in respect of what is so due, he must be credited with the value of his shares at that time. (*d*) However, by the consent in writing of the shareholder and the sanction of a general meeting, shares which have been forfeited or on which money is due may be cancelled, so as to release the holder from all liabilities (*e*); but no money must be paid by the company for the cancellation of any share. (*f*) New shares may be issued in lieu of cancelled shares. (*g*)

*As to companies governed by the Companies act, 1862*, it is provided by Table A., that shares may be forfeited for non-payment of calls (No. 17). In order legally to forfeit a share, under the regulations of this table, it is necessary, first to serve the defaulting member, personally or by post (see \*748 Nos. \*95-97), with a notice (No. 17); and secondly, to pass a resolution of the directors forfeiting his shares (No. 19).

The notice must

1. Require the defaulting member to pay the call in arrear, with interest and any expenses that may have accrued by reason of its non-payment (No. 17) (*h*);

2. Name a further day on or before which the unpaid calls, with the interest and expenses, are to be paid (No. 18);

3. State the place where the payment is to be made, such place being either the company's registered office or some other place at which the calls are usually made payable, *e.g.*, at the company's bankers (No.) 18;

4. State that, in the event of non-payment at or before the time and at the place appointed, the shares in respect of which the call was made will be liable to be forfeited (No. 18).

If the requisitions of this notice are not complied with, the shares in respect of which it was given, may be forfeited, by a resolution

(*a*) Ibid.

(*b*) Ib. § 7.

(*c*) Ib. § 6.

(*d*) Ib. § 7.

(*e*) Ib. § 8.

(*f*) Ib. § 10.

(*g*) Ib. § 11.

(*h*) Interest can only be claimed from the time when the call ought to be paid not from the date of the call, *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687.

of the directors, at any time before payment of what is due in respect of such shares (No. 19).

Any member whose shares have been forfeited is liable to pay all calls due upon them at the time of their forfeiture (No. 21).

Forfeited shares are the property of the company, and may be disposed of as the members at a general <sup>forfeited shares.</sup> meeting think fit (No. 20).

In order to enable such shares to be reissued, and to protect a purchaser from the risk of having his title defeated by some irregularity in the forfeiture, it is provided that a statutory declaration in writing that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share; and such declaration, and the receipt of the company for the price of such share, shall constitute a good title thereto (No. 22).

\*A right to forfeit shares must, in order to be effectually <sup>\*749</sup> exercised, be pursued with the greatest exactness (*i*); it must be exercised by the proper parties (*k*) in the proper manner and for proper cause; that is, it must be *bonâ fide* for the purpose for which the right was conferred. The <sup>Exercise of the right to forfeit.</sup> power to forfeit is a trust, the execution of which will be narrowly scanned by the court (*l*). It cannot, for example, be exercised surreptitiously, for the purpose of expelling a shareholder; nor by connivance, for the purpose of assisting him in getting rid of shares and retiring from the company, in fraud of the other shareholders. A court will not sanction or recognize as valid a forfeiture made *malâ fide* for any such purpose. The case of *Blisset v. Daniel* (*m*),

(*i*) See, as to the insufficiency of notices, &c. *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687; *Watson v. Eales*, 23 Beav. 294; *Van Diemen's Land Co. v. Cockerell*, 1 C. B. N. S. 732, affirming *Cockerell v. Van Diemen's Land Co.* 18 C. B. 454; *Edinburgh, Leith, &c. Rail. Co. v. Hebblewhite*; 6 M. & W. 707; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674. Compare *Graham v. Van Diemen's Land Co.* 1 H. & N. 541.

(*k*) *Garden Gully, &c. Co. v. M'Lister*,

1 App. Ca. 39, where the appointment of the directors was invalid.

(*l*) *Harris v. North Devon Rail. Co.* 20 Beav. 384; *Richmond's case*, and *Painter's case*, 4 K. & J. 305; *Stubbs v. Lister*, 1 Y. & C. C. C. 81. See, also, *Stewart's case*, 1 Ch. 511.

(*m*) 10 Ha. 493. See, too, *Wood v. Woad*, L. R. 9 Ex. 190; *Stubbs v. Lister*, 1 Y. & C. C. C. 81; *Sweny v. Smith*, 7 Eq. 324, where the plaintiff had sent a cheque for his calls.

which will be found referred to at some length in another portion of the present treatise, is a strong illustration of this doctrine, so far as regards the expulsion of a partner, and the invalidity of a forfeiture made for the purpose of enabling a shareholder to retire when he is not entitled so to do, is well shown by the decision in

Forfeiture to  
enable a share-  
holder to retire.

Richmond's case, and Painter's case (*n*). There a director of a company proposed that he and his co-directors should take a number of shares as trustees for the company, and he signed the deed for 2,000 shares, and he was registered as the owner thereof. None of the other directors, however,

followed his example. About two years afterwards he ceased  
\*750 to be a director; and a \*year after that, finding the company to be the reverse of prosperous, he desired to have his 2000 shares cancelled. To enable the directors to cancel them, he suggested that a call should be made on his shares, and that they should be forfeited under the powers contained in the company's deed. This suggestion was acted on; a call was made, and his shares were forfeited for non-payment thereof. But it was held, that the directors had no power whatever to release a shareholder from his obligations by enabling him to retire at the expense of the company; that the shares had not been *bonâ fide* forfeited for the benefit of the company, and that the forfeiture was therefore invalid.

Clauses in deeds of settlement, &c., which declare that on non-payment of calls, &c., shares shall become absolutely  
What amounts  
to a forfeiture. forfeited, do not enable shareholders to get rid of their shares by refusing to pay their calls. Such clauses are inserted for the benefit of the company, and there is no forfeiture until a forfeiture is declared. (*o*)

Moreover, a declared intention to forfeit not carried into effect (*p*), or not duly confirmed, is no forfeiture at all (*q*). Still, if there is power to forfeit, and a declared intention to forfeit, and the

(*n*) 4 K. & J. 305. See, also, Hall's case, 5 Ch. 707; Gower's case, 6 Eq. 77; Spackman v. Evans, L. R. 3 H. L. 171; Stanhope's case, 1 Ch. 161; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43; Harris v. North Devon Rail. Co. 20 Beav. 384; Preston v. Grand Collier Dock Co. 11 Sim. 327.

(*o*) See Moore v. Rawlins, 6 C. B. N.

S. 289.

(*p*) Bigg's case, 1 Eq. 309.

(*q*) See Birmingham, Bristol, &c. Rail. Co. v. Locke, 1 Q. B. 256; Edinburgh, Leith, &c. Rail. Co. v. Hebblewhite, 6 M. & W. 707; London and Brighton Rail. Co. v. Fairclough, 2 Man. & Gr. 674.

shares intended to be forfeited are treated by the company and the shareholder as forfeited, the company will be precluded from afterwards insisting that no forfeiture ever took place (*r*). This doctrine, however, cannot apply where the forfeiture is altogether *ultra vires*; and there are cases in which, after the lapse of many years, persons whose shares had been forfeited in order to enable them to retire were nevertheless held to be contributories. (*s*)

The effect of the forfeiture of a share depends entirely upon whether the forfeiture is valid or not. If it is valid, the \*shareholder ceases, by the forfeiture of \*751 Effect of forfeiture. his shares, to be a member of the company; and although he may be liable to be sued for the calls (*t*) for the non-payment of which his shares have been forfeited, he is not liable to subsequent calls nor to be made a contributory as a present member on the winding up of the company. (*u*)<sup>1</sup> But if a forfeiture is invalid and, if the company is not estopped from showing the invalidity (*x*), then the shareholder does not cease to be a member of the company, and he still remains liable to calls (*y*), and to be made a contributory on the winding up of the company. (*z*) Whether the invalidity of a declaration of forfeiture affords a defense to an action by the injured shareholder against the company for damages occasioned by its wrongful act, is a question on which decisions conflict. (*a*) But

(*r*) *Ex parte* Woollaston, 4 DeG. & J. 437; Knight's case, 2 Ch. 321, where a resolution to forfeit was presumed; Lyster's case, 4 Eq. 233, where the forfeiture was by two directors out of six. See, under the head Contributories, in bk. iv.

(*s*) See *ante*, p. 740.

(*t*) Interest on such calls was held not recoverable in Stocken's case, 5 Eq. 6, and 3 Ch. 412.

(*u*) See, *infra*, under the head Contributories, in book iv. He may be a contributory as a past member, Bridger's case, 4 Ch. 266; Creyke's case, 5 Ch. 63.

<sup>1</sup>A voluntary unincorporated association for manufacturing purposes, provided in their articles of agreement that each stockholder should pay a certain sum per share, at the time of subscribing, and all subsequent assessments, or

forfeit his stock: *Held*, that this was a partnership, and that the stockholders could not escape liability for debts contracted within the scope of the partnership business by a forfeiture of their stock. *Skinner v. Dayton*, 19 Johns. 513.

(*x*) See *ante*, p. 129.

(*y*) See *Birmingham, Bristol, &c. Rail. Co. v. Locke*, 1 Q. B. 256; *Edinburgh, Leith, &c. Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674.

(*z*) *Barton's case*, 4 Drew. 535, and 4 DeG. & J. 46; *Richmond's case*, and *Painter's case*, 4 K. & J. 305, and the cases cited, *ante*, p. 749, note (*n*).

(*a*) See *Catchpole v. Ambergate Rail. Co.* 1 E. & B. 111, and compare the cases in the next note. If a company

if a member has been in fact wrongfully expelled, and been dam-  
 nified, it is not easy to see why an action should not lie. Be this,  
 Relief in such however, as it may, the invalidity of a forfeiture affords  
 cases. no reason why the court should not interfere to protect  
 or restore a shareholder to that position from which he is in fact ex-  
 cluded. In *Hart v. Clarke* (*b*), a shareholder in a cost-book mining  
 company, whose shares had been improperly forfeited, was, after  
 the lapse of a considerable length of time, restored to his rights  
 as a shareholder; in *Norman v. Mitchell* (*c*), and in *Wat-*  
 \*752 *son v. Eales* (*d*), an injunction was granted to restrain \*the  
 carrying into effect of declarations of forfeiture recently  
 made; and in *Stubbs v. Lister* (*e*), a forfeiture of shares was set aside  
 on the ground that the directors who were bound to credit the share-  
 holder with the utmost value of the shares, had credited him with  
 a value set upon them, by themselves, and which value was less  
 than the current market price of shares in the company at the  
 time the forfeiture was declared. In this case the shares were a se-  
 curity for money owing by their owner to the company, and were  
 forfeited for non-payment of that money.

It may further be observed, that although a court will not relieve  
 a person whose shares have been duly forfeited (*f*), it will inter-  
 fere to prevent a forfeiture pending a dispute between a company  
 and a shareholder upon payment by him into court of what may  
 be due from him in respect of the shares intended to be forfeited  
 (*g*), and will take care that the shareholder has credit for whatever  
 the shares may or, if properly sold, might have fetched. (*h*)

has no power to forfeit, a forfeiture can-  
 not be imputed to it, and the action for  
 damages ought to be against its direc-  
 tors, if it can be sustained at all.

(*b*) 6 DeG. M. & G. 232, and 6 H. L.  
 C. 633. See, also, *Sweny v. Smith*, 7  
 Eq. 324; *Garden Gully, &c. Co. v.*  
*M'Lister*, 1 App. Ca. 39; where the de-  
 fense failed, and *Wood v. Woad*, L. R.  
 9 Ex. 190, where it succeeded. The  
 former case does not appear to have

been noticed.

(*c*) 5 DeG. M. & G. 648.

(*d*) 23 Beav. 294.

(*e*) 1 Y. & C. C. C. 81.

(*f*) *Sparks v. Liverpool Waterworks*  
 Co. 13 Ves. 428.

(*g*) See *Naylor v. South Devon Rail.*  
 Co. 1 DeG. & S. 32.

(*h*) See *Stubbs v. Lister*, 1 Y. & C. C.  
 C. 81.

## \*CHAPTER VI.

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## OF CONTRIBUTION AND INDEMNITY WITH REFERENCE TO PARTNERSHIPS AND COMPANIES.

IN this chapter it is proposed to consider the nature of those expenses and losses which, as between the members of a firm or company are chargeable to the aggregate body, and also the nature of those which are properly chargeable against some one or more of the members exclusively of the others. In other words, it is proposed to investigate the principles upon which, in taking the accounts of a firm or company, a given expense or loss is to be placed to the debit of the firm or company, or to the debit of one or more of its members separately. For this purpose it will be convenient in the first place to examine the general principles upon which a right to contribution and indemnity is founded.

Subject of present chapter.

## SECTION I.—GENERAL OBSERVATIONS.

*Foundation of the right to contribution.*

Whether a person who has suffered loss is entitled to be indemnified wholly or partly by others, is a question which cannot be decided in the negative merely upon the ground that no agreement for contribution or indemnity has been entered into. An agreement may undoubtedly give rise to a right to indemnity or contribution; but the absence of an agreement giving rise to such a right, is by no means fatal to its existence. The general principle which prescribes equality of burden and of benefit, is amply sufficient to create a right of contribution in many cases in which it is impossible to found it upon any genuine contract,

express or tacit. The common feature of such cases is that  
 754\* one person has sustained some \*loss which would have fallen  
 upon others as well as upon himself, but which has been  
 averted from them at his expense; for example, where one tenant  
 in common repairs the common property, and so saves it from de-  
 struction (*a*); where one of several sureties pays a debt for which  
 all are liable (*b*); where one person has his goods thrown overboard  
 in order to save the ship and the rest of its cargo. (*c*) In all these  
 cases a right of contribution arises; not by virtue of any contract,  
 but because the safety of some cannot justly be purchased at the  
 expense of others; and all must therefore contribute to the loss sus-  
 tained. (*d*)

But although a right to contribution may exist where there is no  
 contract upon which it can be founded, it cannot exist  
 if excluded by agreement; and it is so excluded when-  
 ever those who would otherwise be contributories have en-  
 tered into any contract, express or tacit, amongst themselves which  
 is inconsistent with a right on the part of one to demand contribu-  
 tions from the others. (*e*) This is too obvious to require comment,  
 but it must be borne in mind as qualifying the common saying,  
 that the right to contribution is independent of agreement.

Again, a right to contribution may be excluded by fraud, as is  
 the case where a person induces another by false and  
 fraudulent representations to join him in partnership.  
 In such a case the person defrauded has a right to rescind the con-  
 tract of partnership, and, as between himself and co-partner, to  
 throw all the partnership losses upon the latter alone. (*f*)

The application of these principles to the winding up of compa-  
 nies will be noticed in a subsequent part of the work.

(*a*) F. N. B. 162, *b*.

(*b*) *Dering v. Winchelsea*, 1 Cox 318.

(*c*) *Abbott on Shipping*, part iv. c. 10.

(*d*) *Lefroy v. Gore*, 1 Jo. & Lat. 571;

*Spottiswoode's case*, 6 DeG. M. & G. 345; *Ashurst v. Mason*, 20 Eq. 225; a case of co-directors noticed, *ante*, 597. See, too, the cases in 1 Eq. Ca. Ab. Contribution and Average, and in the note to *Averall v. Wade*, Ll. & Gould (temp. Sug.), 264.

(*e*) As in *Gillan v. Morrison*, 1 DeG. & S. 421; *Re the Worcester Corn Exchange Co.* 3 DeG. M. & G. 180, which will be noticed hereafter.

(*f*) See *Pillans v. Harkness*, Colles, 442; *Rawlins v. Wickham*, 1 Giff. 355, and 3 DeG. & J. 304, noticed more fully hereafter under the head Rescission of Contract. See, too, *Carew's case*, 7 DeG. M. & G. 43.

*\*Of the right of agents and trustees to indemnity from their principals and cestui que trustent.\**<sup>1</sup> 755

In order to clear the way for the discussion of the right of a partner to be indemnified by his firm, and of the right of directors to be indemnified by the company of which they have the management, it is necessary to advert shortly to the right of agents and trustees to be indemnified by their principals and *cestui que trustent*.

With respect to agents the following cases have to be considered.

1. When the agent having instructions executes them;
2. When the agent having instructions does not follow them;
3. When the agent having no instructions acts nevertheless for his principal.

1. With respect to the first of these three classes of cases, nothing is clearer than that an agent who has instructions to act in a certain manner, is entitled to be reimbursed by his principal for all outlays made in pursuance of these instructions, and to be indemnified for any loss sustained by executing them. (*g*) Even if what the agent does is unlawful he is entitled to indemnity (*h*); unless, indeed, the act be one which the agent must have known his principal could under no circumstances justify; for then the maxim *in pari delicto melior est positio defendantis* applies, and the agent can obtain no indemnity from a court of justice. (*i*)

2. It is equally clear that, speaking generally, an agent who acts *contrary* to his instructions is not entitled to any indemnity or reimbursement for losses or expenses incurred whilst so acting. (*k*) Even although the instructions may

Agent's right to indemnity.

1. When he obeys his instructions.

2. When he disobeys i. is instructions.

<sup>1</sup> See this subject considered and the cases collected in Ewell's *Evans on Agency* \*353 *et seq.*, and notes.

(*g*) Story on *Agency*, § 335 *et seq.*; Paley on *Agency*, chap. 2; Smith, *Merc. Law*, pp. 119, 120, ed. 9; Curtis *v. Barclay*, 5 B. & C. 141. As to costs of actions unsuccessfully defended, see Broom *v. Hall*, 7 C. B. N. S. 503.

(*h*) Adamson *v. Jarvis*, 4 Bing. 66; Betts *v. Gibbins*, 2 A. & E. 57; *per Tin-*

dal, C. J., in *Collins v. Evans*, 5 Q. B. 830.

(*i*) See *Merryweather v. Nixan*, 2 Sm. L. C.; *Collins v. Blantern*, 1 ib.; *Josephs v. Pebrer*, 3 B. & C. 639; *Schackell v. Rosier*, 2 Bing. N. C. 634.

(*k*) See *Stokes v. Lewis*, 1 T. R. 20; *Gallway v. Smithson*, 10 East, 264; *Child v. Morley*, 8 T. R. 610; *Warwick v. Slade*, 3 Camp. 127.

\*756 have been \*given by the principal under a misapprehension of facts, and the agent, being aware that such was the case, may have acted *bonâ fide* for the benefit of his principal (*l*), still the agent will not be entitled to indemnity; for it is the duty of an agent to obey and not to disregard his orders. But if the principal chooses to ratify the agent's conduct, the latter acquires a right to be considered as having acted in pursuance of instructions, and to be entitled to reimbursement and indemnity accordingly; for the principal cannot, whilst ratifying the agent's conduct so far as it is beneficial, repudiate it so far as it is onerous. (*m*)

The position of an agent who has already acted on his instructions, and has thereby incurred a legal obligation to third parties, is different. The better opinion is that in this case he is not bound on the command of his principal to stop short and refuse to perform the obligation incurred. There is no doubt that, as between himself as his principal, an agent is *entitled* to obey the counter order, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry out the instructions on which he has begun to act, as may be necessary to relieve himself from all the legal liabilities incurred before notice of the countermand, and having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions. *Nemo potest mutare consilium suum in alterius injuriam* is the maxim of the civil law, and expresses the correct principle for the decision of these cases. (*n*)

3. There remains the third class of cases, viz., where the agent, having no instructions to guide him, acts for his principal, and then seeks to be indemnified by him. Now here, as in the last class of cases, ratification by the principal removes all difficulty, and may be excluded from consideration.

\*757 \*Again, an agent having no specific instructions may yet have an implied authority to act in a given way for his principal; and in the absence of orders to the contrary, an agent

(*l*) Howard *v.* Tucker, 1 B. & Ad. 712.

(*m*) Story on Agency, § 250.

(*n*) The subject is not, however, free from doubt. The position in the text is supported by Pothier, Mandat. No. 121, and Story, Agency, § 465. &c., and by

Balsh *v.* Hyam, 2 P. W. 453; Sutton *v.* Tatham, 10 A. & E. 27. On the other hand, see 2 Kent. Com. 644. In Child *v.* Morley, 8 T. R. 610, and Warwick *v.* Slade, 3 Camp. 127, the agent was only bound in honor.

always has implied authority to act in the manner in which he has been accustomed to act with the approval of his principal; and to act with respect to any matter as other persons situate like himself usually act with respect to similar matters; and to take all those steps which are usual and necessary to enable him duly to execute his instructions. (*o*) It may therefore well happen that an agent who has no positive instructions, may nevertheless act within the limits of his real authority; and so long as he keeps within those limits he is entitled to reimbursement and indemnity. (*p*) The principle applicable to the first class of cases applies here; but if the agent claims an indemnity against loss sustained by the commission by him of an illegal act, he must be prepared with very strong evidence to show that such acts fell within the limits of his authority. In a case of doubt no authority to commit an unlawful act can be inferred.

The greatest difficulty arises when an agent acts without any authority, express or tacit, but *bonâ fide* for the benefit of his principal. There is a leaning in many minds in favor of the agent in such cases, and it cannot be denied that circumstances may occur which render officious conduct justifiable, and even benevolent. On the other hand, *culpa est immiscere se, rei ad se non pertinenti* (*q*); and by the law of England a person who chooses, unasked, to incur expense for another, must, speaking generally, trust rather to gratitude than to judicial aid for reimbursement. (*r*) The only established exceptions to this rule seem to be—1, where one person alone sustains a loss or incurs expense for the relief of himself and others from some \*risk or obligation common to all; and, 2, where one person does for another that which the latter is legally bound to do, but either cannot or will not do himself. The first class of exceptions has been already alluded to. The second may be illustrated by those cases in which executors and husbands

Rights of a person who unasked acts for another.

(*o*) Story on Agency, c. 6.

(*p*) *Curtis v. Barclay*, 5 B. & C. 141; *Sutton v. Tatham*, 10 A. & E. 27; see, too, 1 Wms. Saund. 264, b; *Pettman v. Keble*, 15 Jur. 38; *Wolfe v. Horncastle*, 1 Bos. & P. 323, *per Buller, J.* This was also the principle applied in *R. v. Essex*, 4 T. R. 591, and referred to by Lord Cottenham in *A.-G.*

*v. The Mayor of Norwich*, 2 M. & Cr. 424.

(*q*) Dig. T. tit. 17, DeReg. Jur. L. 36.

(*r*) See as to the *negotiorum gestor* of the Roman law, Dig. III. tit. 5, DeNegot. Gest. Thibaut's System des Pand. Recht. § 558, ed. 9.

are held liable for the expenses of funerals, although they gave no orders for them, and took no part in them. (s)

The general rule, certainly, is that the officious conduct of one person imposes no obligation on another to compensate him for, or indemnify him from, the consequences of his own spontaneous act; and even although the other may be benefited, he cannot on that ground alone be compelled to pay for what he never sought to obtain. (t) A very strong illustration of

Edmiston v. Wright. this is afforded by the case of Edmiston v. Wright (u)

There the defendant was the owner of some estates in Georgia, and of some negroes in Jamaica. The plaintiff's partner was the defendant's agent, and the general manager of his West Indian estates. The negroes in Jamaica were shipped for Georgia, and seized by Custom-house officers in consequence of the captain of the ship having neglected to procure some necessary documents. The plaintiff, for the purpose of redeeming the negroes from the authorities who had seized them, paid the sum of 1200*l.*, and the negroes were then allowed to proceed to the defendant's estate in Georgia. The plaintiff sued the defendant for the sum of 1200*l.* as money paid to his use, but Lord Ellenborough held that it was a voluntary payment made by the plaintiff, and one which he could not recover from the defendant.

The right of a trustee to indemnity from his *cestui que trust* very closely resembles the right of an agent to indemnity from his principal—

Right of trustees to indemnity.

1. A trustee is clearly entitled to be indemnified out of the trust property against all costs, charges, and expenses properly incurred, and against all losses sustained by him, in the \*execution of his trust (x); and if the trust party is not sufficient for the purpose of indemnifying him in respect of such matters, his *cestui que trust*, if under no disability, is personally liable to indemnify him (y), unless such liability is excluded by some special circumstance. (z)

(s) See *Ambrose v. Kerrison*, 10 C. B. 776; *Rogers v. Price*, 3 Y. & J. 28; *Jenkins v. Tucker*, 1 H. Bl. 91.

(t) 1 Wms. Saund. 264, a; 6 B. & C. 444, *per* Bayley, J.; *Stokes v. Lewis*, 1 T. R. 20; *Child v. Morley*, 8 T. R. 610.

(u) 1 Camp. 88.

(x) *Re Bleckley*, 35 Beav. 449, where

this rule was applied in favor of a trustee for a company against its debenture-holders.

(y) See *Oriental and Commercial Bank*, 3 Ch. 791; *Balsh v. Hyam*, 2 P. W. 453; *Phene v. Gillan*, 5 Ha. 1, and *Ex parte Chippendale*, 4 DeG. M. & G. 52.

(z) If there is an express covenant to

2. On the other hand, a trustee who commits a breach of trust is entitled to no indemnity in respect thereof, except from those *cestui que trustent*, if any, at whose request he wrongfully acted, or who have sanctioned and benefited by his improper conduct. (a)

3. Every act of a trustee respecting the trust property must necessarily either be warranted by the trust reposed in him, or amount to a breach of trust, and must therefore be governed by one or other of the two foregoing principles. But as with agents, so with trustees; their acts may be proper, although not expressly authorized; and whatever is necessary in order duly to execute an express trust, is warranted by that trust, and entitles the trustee to indemnity accordingly. But even this principle will not entitle a trustee to indemnity in respect of everything he may do *bonâ fide* for the benefit of his *cestui que trust*; regard must be had to the nature of the trusts to be executed.

*Of the right of partners and directors to indemnity by the firm or company.*

Passing now to contribution and indemnity between partners, it is to be observed that every member of an ordinary firm is, to a certain extent, both a principal and an agent. He is liable as a principal to the debts and engagements of the firm, and in respect of them he is entitled to contribution from his \*co-partners; for they have no right to throw on him alone the burden of obligations which, *ex hypothesi*, are theirs as much as his. (b)<sup>1</sup> Again, each member

Position of partner as regards indemnity.

\*760

indemnify, the obligation will be limited by the covenant. See *Selwyn v. Harrison*, 2 J. & H. 334; *Gillan v. Morrison*, 1 DeG. & Sm. 421.

(a) See *Lewin on Trusts*, p. 525, ed. 6.

(b) See *Robinson's case*, 6 DeG. M. & G. 572; *Spottiswoode's case*, ib. 345; *Lefroy v. Gore*, 1 Jo. & Lat. 571.

<sup>1</sup> See *Forbes v. Webster*, 2 Vt. 58.

After the dissolution of a partnership, a judgment upon a partnership debt was rendered against the partners, and execution was levied upon lands belonging to them severally: *Held*, that a

partner who redeemed the lands from the execution was entitled in equity to contribution. *Downs v. Jackson*, 33 Ill. 464.

Two partners had been engaged in purchasing cattle; most of them were sold, and it was agreed that the residue should be taken by one of them at a specified price. They settled their partnership accounts and divided the assets. For some of the cattle sold a note was given to the firm, which was received by the plaintiff, who indorsed it in the name of the firm, had it discounted, and

as an agent of the firm is entitled to be indemnified by the firm against losses and expenses *bonâ fide* incurred by him for the benefit of the firm, whilst pursuing the authority conferred upon him by

applied the proceeds to the credit of the firm. The debtor failed to pay the note, the plaintiff paid it and brought this action against the other partner for contribution: *Held*, that nothing short of an agreement, mutually releasing each other from liability on the note, would produce such effect, and no such agreement was proved. *Kelly v. Kauffman*, 18 Pa. St. 351.

Where a partner executed a note in the firm name to raise his share of the capital stock, and such note was executed to a person ignorant of that fact, the firm was held responsible for the note, and the other partner entitled to his bill for contribution. His bill for contribution could be defeated, however, by proof under appropriate pleadings, showing that the defendant had paid his proportion of the debts of the firm. *Fletcher v. Brown*, 7 Humph. 385.

Where, after division of the assets of a late firm, one partner is compelled to pay outstanding debts, he may sue for contribution. *Eskins v. Knox*, 6 Rich. 14. See, also, *Maginnis v. Crosby*, 11 La. Ann. 49; *Forbes v. Webster*, *sup.*

A partner in the location of land warrants, on adjusting a demand occasioned by the personal default of his co-partner, is entitled against him to contribution. *Noel v. Bowman*, 2 Litt. 46.

To entitle one partner to recover at law of another partner contribution for his proportion of the debts of the firm paid since dissolution by the former, it must appear that the latter was notified of such payment before suit. *Dakin v. Graves*, 48 N. H. 45.

In an action by one partner against his co-partner for contribution for a partnership debt paid by the plaintiff more than six years after the general assignment of the partnership effects

for the benefit of their creditors, the presumption is that the partnership accounts are settled, and the burden is upon the defendant to show the contrary. *Brown v. Agnew*, 6 Watts & S. 235.

Where a surviving partner, after exhausting the partnership assets, is compelled to pay the residue of the partnership debts out of his own means, he is entitled to recover from the estate of the deceased partner a moiety of the amount thus paid. *Olleman v. Reagan*, 23 Ind. 109. See, also, *Wheeler v. Arnold*, 3 Mich. 304.

Where a suit is brought by a surviving partner, as such, if he fails, the estate of the deceased partner is liable to contribute to the costs. *Allen v. Blanchard*, 9 Cow. 631.

The representatives of a deceased partner, who had paid the whole of a partnership debt, will be substituted in the place of the creditor, in order to recover a contribution from the surviving partner or his estate. *Sells v. Hubbell*, 2 Johns. Ch. 394.

There is no principle, on which, after the satisfaction of a judgment for a partnership debt, by one of the partners sued, equity ought to extend or preserve the vitality of the legal security, under the guise of an assignment, so as to charge the bail of the other partner. *Hinton v. Odenheimer*, 4 Jones Eq. 406.

Where several judgments are recovered for the same debt, against the surviving partners and the administratrix of a deceased partner, she cannot, by paying the judgment against her, and taking an assignment of the other, have execution thereon in the name of the plaintiff, in order to her reimbursement. *Bartlett v. M'Rae*, 4 Ala. 688.

Pending an action against A for

the agreement entered into between himself and his co-partners. On the other hand, a partner has no right to charge the firm with losses or expenses incurred by his own negligence or want of skill, or in disregard of the authority reposed in him.

breach of a contract which was in fact the contract of the firm of A and B, the partners had a settlement of all the partnership dealings, except the sum to be paid by B to A upon the determination of such action. At the time of the settlement the firm owned certain lots of land, of which the title was in A, and A testified that B proposed a division of the lands into two parcels, and the execution of a deed by A to him of one parcel, to be determined by lot; that A objected, on the ground that said action was not yet settled; that B asked in reply, "Am I not man enough for that suit?" that a third person interposed the remark that B was "good enough for that amount, and there was no need of any writing between them in regard to it;" and that A thereupon assented to what was said, and executed a deed of B's parcel of the lands: *Held*, that the evidence sustained a finding that B promised to repay to A the former's share of whatever the latter might be compelled to pay in said action, and that A conveyed the land to B upon faith of such promise. *Gauger v. Pantz*, 45 Wis. 449.

An award required the partner taking charge of the assets to indemnify his co-partner against the firm liabilities: *Held*, that even if such had not been the terms of the award, a court of equity should have required such indemnity; and, therefore, whether the award was correct or not, it was proper not to dissolve an injunction which had been granted, without imposing such indemnity as a condition. *Cook v. Jenkins*, 35 Ga. 113.

If one partner pays an award against the firm, the amount of the award is

conclusive upon the question of contribution by the others. *Evans v. Clapp*, 123 Mass. 165.

Where property owned by two partners is subject to a mortgage, and, as between the two, it is the duty of one to discharge it, and the other pays the debt on condition that the mortgage shall enure to his benefit, an equity arises in his favor entitling him to indemnity through the mortgage. *Laylin v. Know*, 41 Mich. 40.

A member of a partnership who has sold and delivered to his co-partners his interest in the partnership property and choses in action, in consideration of their payment to him of a stipulated sum, and their agreement to pay off the partnership indebtedness may, if he be compelled to pay off such indebtedness, recover the same of them. *Vanness v. Dubois*, 64 Ind. 338. See, also, *Hinkle v. Reid*, 43 Ind. 390; *Myers v. Smith*, 15 Iowa, 181. Such an agreement is not within the statute of frauds, and is upon a valuable consideration. *Vanness v. Dubois*, *supra*. See, also, *Gauger v. Pantz*, 45 Wisc. 449.

Members of a co-partnership association who have assigned their interest therein to other solvent parties, with the assent of their co-partners, and who accept such assignees as co-partners in their stead, and recognize and treat them as such, are not, as between themselves, liable for the debts of the co-partnership existing at the time of such assignment, and they cannot be required to contribute for their payment to those continuing partners who have been required to pay the same. *Savage v. Putnam*, 32 N. Y. 501.

Where a member of a co-partnership

Similar observations apply to directors of companies. As mem-  
 Position of  
 directors. bers, they are entitled to contribution in respect of such  
 debts and liabilities of the company as they may be  
 compellable or have been compelled to pay; and as agents and  
 trustees they are entitled to be indemnified by the company against  
 all losses and expenses *bonâ fide* sustained and incurred by them  
 in the exercise of the trust reposed in them. But if directors ex-  
 ceed their authority, and thereby incur loss, such loss must be  
 borne by them and not by the company, unless the company rati-  
 fies what they have done. But even in this case one director will  
 be entitled to contribution from his co-directors if he has acted with  
 their knowledge and consent. (c)

The cases illustrating these general statements will be examined  
 in the subsequent sections of the present chapter, but before pro-  
 ceeding to notice them it is requisite to allude to certain decisions  
 of courts of equity, which tend to show that where di-  
 rectors of a company acting *bonâ fide* and to the best  
 Directors act-  
 ing *bonâ fide*,  
 but beyond  
 their authority. of their judgment, advance money in order to carry on  
 the business of the company, and spend the money for that pur-  
 pose, they are entitled to be reimbursed by the company; although  
 they had no authority to borrow money, and could not have ren-  
 dered the company liable to third persons for money lent on the  
 credit of the company.

retires by consent, there is an implied  
 promise on the part of the remaining  
 partners to pay the debts of the firm and  
 save the retiring partner harmless to  
 the extent of the assets received, but no  
 further; if the assets are insufficient to  
 indemnify him, he is entitled to contri-  
 bution from those of his former co-part-  
 ners who are solvent. *Hobbs v. Wilson*,  
 1 W. Va. 50.

H., who was of the firm of H. &  
 G., and also of the firm of H. & E.  
 drew in the name of H. & G., in favor  
 of H. & E., and, after acceptance in-  
 dorsed the draft in the name of H. & E.  
 The draft was discounted, and H. re-  
 ceived the proceeds. The acceptor was  
 not indebted to either firm; the draft  
 was not for the benefit of either firm,  
 and the whole transaction was without  
 the authority or knowledge of any of

his partners. The bank which dis-  
 counted the draft recovered the amount  
 from H. & E.: *Held*, in a suit by H. &  
 E. against H. & G. that the latter were  
 not liable for contribution. *Grubb v.*  
*Cottrell*, 62 Pa. St. 23.

A partner who goes out of a partner-  
 ship and for a valuable consideration, is  
 indemnified by his partners against all  
 debts and liabilities of the firm, stands  
 in the attitude of a stranger as against  
 a creditor of one of the partners for his  
 individual debt where judgment has  
 been obtained since his outgoing, and  
 is entitled to subrogation for a debt of  
 the firm paid him, for which he was not  
 liable as between himself and partners,  
 at the time of leaving the firm. *Scott's*  
*Appeal*, 88 Pa. St. 173.

(c) See *Ashurst v. Mason*, 20 Eq. 225,  
 noticed *ante*, pp. 597, 754.

Upon this subject the case of the German Mining Company (*d*) is the leading authority. It was there decided that \*directors who had no power to borrow \*761 money on the credit of the company, but who nevertheless did borrow money, and themselves advance money, and *bonâ fide* apply the whole for the benefit of the company, were entitled, having themselves repaid the money borrowed, to be reimbursed by the shareholders the whole amount borrowed and advanced. The circumstances of this case were somewhat peculiar. The partnership was a mining partnership; it was absolutely necessary to work the mines in order to preserve them from rapid deterioration and destruction; the directors had ostensible power not only to carry on the mines, but also to carry them on on credit; the money borrowed and advanced was wholly applied in paying miners' wages, and other expenses necessarily incurred in carrying on the works, and so preserving the mines; and the shareholders were kept informed of what was being done. The money borrowed and advanced was in fact applied in discharging debts for which the company was or would have been legally responsible, and although it by no means necessarily followed that those debts were not incurred improperly as between the directors and the shareholders, yet the full information which the shareholders had of what was being done, precluded them from saying that the debts were improperly incurred. Although, therefore, the company was not liable at law to repay the money borrowed, the mode in which that money was applied, coupled with the acquiescence of the shareholders in the course pursued by the directors, entitled them to be reimbursed the money they had advanced.

This case paved the way for others which have gone far beyond it.

In the Norwich Yarn Company's case (*e*), the company's deed of settlement was prepared with an anxious view to limit the liability of the shareholders, as between themselves, Ex parte Bignold. to the amount of their shares in the capital of the company; and there were certain provisions for increasing that capital, and for borrowing money on mortgage of the company's landed property. The capital being all expended, the directors, instead of raising money by increasing the capital, or by mortgage, from time to time borrowed money of a bank, and applied the \*money \*762

(*d*) *Ex parte* Chippendale, 4 DeG. M. & G. 19.

(*e*) 22 Beav. 143, *Ex parte* Bignold.

in carrying on the business of the company. It was held that they were entitled to charge this money against the company, although the consequence was to render each shareholder liable to a considerable extent beyond the amount of his share. (*f*)

In Baker's case (*g*), the V.-C. Kindersley held that a director of a company governed by 7 & 8 Vict. c. 110, was not entitled to stand as a creditor against the company by virtue of a debenture issued to him by the company, for the loan had not been confirmed as required by that statute. (*h*) But his Honor said :

"But although, for want of confirmation, the contract is not binding upon the company as a contract, still *Mr. Baker* may be entitled to recover the money, if he can show that it was duly applied in carrying on the business of the company. For, if a director, finding that it is necessary for the carrying on of the business of the company that goods should be purchased, or that workmen should be employed and wages paid, or that other disbursements should be made, and that there are no available funds of the company at their bankers, should, out of his own pocket, advance the money necessary to carry on the business, and it was applied accordingly, he would have a right to recover that money; and, in my opinion, such a transaction would not be a contract within the meaning of the 29th section.

"Upon the whole, I am of opinion that the claim of *Mr. Baker*, by virtue of the contract, must be disallowed; but he must be at liberty to establish a claim for so much of the sum in question as he can show to have been properly applied for the purposes of the company,"

This case was followed by Troup's case (*i*), and Hoare's case (*j*), in both of which the shareholders of a company were held liable to reimburse the directors a sum of money borrowed by them without authority, but applied in the construction of the works of the company.

In Lowndes v. The Garnett and Moseley Mining Company (*k*), advances were made by a director, and were applied in paying debts of the company; the shareholders were held liable to repay the advances, although they had

(*f*) It is very difficult to reconcile the company's deed in the Norwich Yarn Company's case with the notion that the directors had, as between themselves and the shareholders, power to borrow in any other way than that pointed out in the deed; and yet if this were not so, the decision ought to have been against the directors, as in the case of The Worcester Corn Exchange, 3 DeG. M. & G. 180, and Selwyn v. Harrison, 2 J. & H.

334, noticed *infra*, pp. 765, 767.

(*g*) 1 Dr. & Sm. 55. See, also, British Prov. Society v. Norton, 3 N. R. 147, and 9 Jur. N. S. 1308.

(*h*) The 29th section of 7 & 8 Vict. c. 110, rendered contracts with directors invalid, unless confirmed by the company. There were some exceptions.

(*i*) 29 Beav. 353.

(*j*) 30 Beav. 225.

(*k*) 3 N. R. 601.

not been sanctioned in the manner required by the regulations of the company respecting the borrowing of money.

These decisions are based upon the principle laid down in the case of The German Mining Company, that directors are not only agents, and in that character incapable of binding their companies beyond the limits of their authority, but are also trustees, and in that character entitled to be indemnified for expenses incurred by them within the limits of their trust; and that directors do not exceed the limits of their trust by borrowing and advancing money *bonâ fide* for the purposes of the company, although the borrowing may have been an excess of authority, and the company may not be bound to repay the money to those from whom the directors obtained it.

Observations  
on the fore-  
going cases.

It is difficult to understand the correctness of this view, or to see how that which, as between the directors and the shareholders, is a clear excess of authority, can as between the same persons be deemed warranted by any trust. Nor is it easy to assent to the doctrine that where shareholders have anxiously limited the powers of directors with respect to raising capital and borrowing money, there is no breach of trust on the part of directors who persist in carrying on the business of the company on credit, when the capital of the company has been expended, and its borrowing powers have been exhausted. The principle alluded to has always appeared to the writer to require reconsideration, and to be at variance with the established doctrine that an agent who exceeds his authority is not entitled to indemnity against the consequences of his unauthorized acts; and practically to place shareholders at the mercy of their directors, however carefully the powers of the managing body may have been defined and restricted. It is not a little remarkable, that whilst the courts have gone great lengths in protecting shareholders against *bonâ fide* creditors, \*by making \*764 them look to the powers of the directors, comparatively little protection is afforded to shareholders against *bonâ fide* directors; and yet one would have supposed it to be more in accordance with established principles, to prevent directors rather than creditors from holding shareholders liable beyond the limits imposed by companies' deeds of settlement.

It may be urged, in support of the decisions in question, that as, if gain had resulted from the outlays made by the directors, the shareholders would have had the benefit of it, so it is only fair that

if loss has unfortunately ensued they should sustain that loss. But in answer to this, the shareholders are entitled to say, "As you chose to act without authority, it rests with us to adopt or repudiate what you have done; and we are not to be deprived of our right of repudiation, on the ground that if we elect not to repudiate your acts, we shall be bound to indemnify you." Neither has the maxim, *qui sentit commodum sentire debet et onus*, any application; unless the shareholders had some opportunity, either of objecting to the outlays before they were made, or of rejecting the benefit and the burden at some subsequent period. If the shareholders, having had an opportunity of objecting to the proposed outlay, did not object; or if, having had an opportunity of rejecting the benefit derived from the outlay, they have declined to do so, then, indeed, the maxim may apply; but in the absence of any such opportunity it is impossible to hold them liable to indemnify the directors on the ground of having had the benefit of the expenditure. No liability can be established on this ground, unless it is to be held that a benefit is to be paid for, because it cannot be got rid of.

With reference to the extract from the judgment in Baker's case, Observation on given above, the writer ventures to observe, that judgment in Baker's case. though the doctrine there laid down is apparently warranted by what fell from the Court in the case of The German Mining Company, yet, as already pointed out, the actual decision in that case by no means involves the necessity of holding that as between directors and shareholders the liability of the latter is to be determined by the benefits they have received rather than by the powers which they have conferred. When directors who have no power to borrow money find that the business of the

\*765 \*company cannot go on without borrowing, they ought to disclose the truth to the shareholders. If, however, the principles laid down in the above decisions are to be taken as correct, and are to be logically carried out, it will follow that directors may, if they honestly believe it to be for the benefit of a company, advance and borrow money to any unlimited extent, and expend it in attempting to keep the company on foot; and then, having failed, make the shareholders, at least in unlimited companies, pay for the experiment. Surely this cannot be right.

Comparison of the foregoing cases with others.

The decisions noticed above, are, however, hardly reconcilable with other cases.

In the Worcester Corn Exchange Company's case (*l*), a company was formed for the purpose of building a corn exchange. The deed of settlement of the company limited the amount of each shareholder's subscription and authorized the directors to create new shares and to raise money by borrowing, under certain restrictions. The capital of the company being expended, and more money being required, the directors advanced money themselves, and expended it in payment of debts of the company. They also, but in excess of their powers, borrowed money of a bank which had notice of the company's deed, and that money was similarly expended. It was held that the directors were not entitled to charge the shareholders, either in respect of the advances or in respect of the bank debt, beyond the amount of the capital which each shareholder had agreed to subscribe.

Re The Worcester Corn Exchange Company.

Again, in Cropper's case (*m*), a committee of directors charged with the winding up of a company, was held not entitled to be repaid by the company, expenses incurred in endeavoring to obtain the passing of a public bill pending in Parliament, for facilitating the winding up of the affairs of insolvent companies generally; for to support bills in Parliament was not within the scope of the committee's authority.

Cropper's case.

These decisions are strictly in conformity with the sensible rule that agents are not entitled to any indemnity from their principals in respect of unauthorized expenditure; and in the first edition of this work the writer ventured to express a hope, \*that this 766\* rule, so essential to the protection of shareholders against directors, would not be frittered away; and that the principle of the German Mining Company's case would not receive further countenance. That hope has been partially realized, for all attempts to extend that principle have failed, and its practical application is now confined to cases where the money has been applied in discharging debts for which the company was liable. (*n*) Even when thus restricted, however, it must be borne in mind that debts for which a company is liable may as between the directors and the shareholders have been improperly contracted by the directors; and in such a case the directors ought to indemnify the shareholders and not the shareholders the directors.

(*l*) 3 DeG. M. & G. 180.

(*m*) 1 DeG. M. & G. 147.

(*n*) See *Ex parte Williamson*, 5 Ch. 309; *Cork and Youghal Rail. Co.* 4 Ch.

748; *Hill's case*, 9 Eq. 605; *Davis' case*, 12 Eq. 516; *The Catholic Publishing Co.* 10 Jur. N. S. 193; and *ante*, p. 363.

Notwithstanding the lengths to which the courts have gone in the cases observed upon above, directors who borrow money without authority, and apply it to purposes not falling within the scope of the company's business, are not entitled to be reimbursed by the shareholders. This is well shown by the recent case of the Kent Benefit Building Society. (*o*) There the managing committee of a benefit building society exceeded their powers by purchasing land, and by borrowing the money to pay for it. The repayment of the money was secured by a mortgage of the land purchased. The society was ordered to be wound up. The mortgage securities were realized for less than the amount due upon them, and the members of the committee had to make good the difference. They sought to prove the amount paid by them as a debt against the society; but it was held that the society was not liable. The fact of the borrowing appears to have been brought to the notice of the society at a general meeting; but there was nothing to show that the acts of the committee had been sanctioned by all the members of the society; and to buy land was not within the scope of the objects of the society, and was altogether *ultra vires*.

2. Where the right to indemnity is expressly restricted.

Again, the right of directors to indemnity, \*767 if expressly \*confined and limited, cannot be extended beyond the limit thus expressly set. The

two following cases illustrate this.

In *Gillan v. Morrison* (*p*), a company was formed for purchasing land in Segovia, and establishing a colony there. It was agreed at a meeting of the directors and proposed shareholders, that an expedition should proceed to Segovia, to examine and report upon the land which it was proposed the company should purchase; that the expense of the expedition should not exceed 1200*l.*; that the expense to that amount should be defrayed out of the shareholders' deposits; and that if the expense should exceed 1200*l.*, the difference should be raised by a new issue of shares. Certain persons were appointed trustees to direct the fitting out of the expedition, to nominate the persons who were to conduct it, and to manage the fund supplied for defraying the expenses. The persons composing the expedition proceeded to Segovia, and arrived at the place where the lands in question were situate: and were then arrested and imprisoned. The object of the

*Gillan v. Morrison.*

expedition was thus frustrated; the expenses incurred by its members greatly exceeded the fixed sum of 1200*l.*; and an attempt was made on behalf of the trustees to compel the shareholders to make good the excess. But it was held that, as between the trustees and the shareholders, the liability of the latter was limited to 1200*l.*, and that they were not bound to contribute more.

Again, in the case of *Selwyn v. Harrison* (*q*), the creditors of a firm executed a deed by which the business of the firm was placed in the hands of inspectors, and the creditors severally covenanted to indemnify the inspectors to a limited extent against the liabilities which they might incur in carrying on the business. It was held that the creditors were not bound, otherwise than by their covenants, to contribute to the payment of debts contracted by the inspectors in carrying on the business. The express covenant to indemnify the trustees to a definite amount, excluded any more extensive obligation to indemnify them which might otherwise have arisen.

The reader, however, will not fail to observe that both in *The German Mining Company's* case and in *The Norwich Yarn \*Company's* case, the shareholders had taken care to stipulate that their liability should not be unlimited. \*768

It is scarcely necessary to remark that the shareholders in a limited liability company cannot be compelled to contribute more than the amount of their shares, either for the purpose of indemnifying directors or for any other purpose.

*Of some former differences between contribution at law and in equity.*

Before the passing of the Judicature acts, a right to contribution or indemnity, arising otherwise than by special agreement, was only enforceable at law by a person who could prove that he had already sustained a loss. (*r*) But in equity it was very reasonably held, that even in the absence of any special agreement, a person who was entitled to contribution or indemnity from another could enforce his right

1. As to indemnity before loss has been sustained.

(*q*) 2 J. & H. 334.

<sup>1</sup> As to whether contribution is to be compelled by action at law or bill in equity, see *post*, pp. 1026, 1029, and notes.

(*r*) See *Maxwell v. Jameson*, 2 B. & A. 51. Compare *Spark v. Heslop*, 1 E. & E. 563, and the judgment of Crompton, J. in *Randall v. Raper*, E. B. & E. 84.

before he had sustained actual loss (s)<sup>2</sup>; and this principle will now prevail in all divisions of the High Court. (t) Therefore a person who is entitled to be indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation (u); and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified (v); and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is

dead or insolvent the full amount provable against his estate, and not only \*the amount of dividend which such a state can pay. (x) In strict conformity with these principles,

partners and directors who are individually liable to be sued on bonds and notes, which as between them and their co-partners are to be regarded as the bonds and notes of the firm or company are entitled to call for contribution before these bonds or notes have been actually paid. (y) So a trustee of shares is entitled to be indemnified by his *cestui que trust* against calls before they are paid. (z)

Another difference between law and equity which formerly prevailed, and to which it is necessary to advert, affects the mode in which the amount to be paid by each of several contributories was ascertained.

At law, before the Judicature acts, if several persons had to contribute a certain sum, the share which each had to pay, was the total amount divided by the number of con-

2. As to the amount payable by each contributory.

(s) See *Lacey v. Hill*, 18 Eq. 182, and the cases noticed *infra*.

<sup>2</sup> See *Hodgson v. Baldwin*, 65 Ill. 532.

(t) See Jud. Act, 1873, §§ 24 and 25.

(u) *Wooldridge v. Norris*, 6 Eq. 410; *Nesbit v. Smith*, 2 Bro. C. C. 582.

(v) See *Ranelagh v. Hayes*, 1 Vern. 190.

(x) *Cruse v. Paine*, 6 Eq. 641, and 4 Ch. 441.

(y) See, for example, *The Norwich Yarn Co.'s case*, 22 Beav. 143; the

money borrowed by the directors in that case was secured by their own notes, but these notes had not been actually paid when the call on the shareholders was made. This does not appear very clearly from the report referred to, but the writer has been informed by persons conversant with the case that the above statement is correct.

(z) *Oriental Commercial Bank*, 3 Ch. 791; *Cruse v. Paine*, 6 Eq. 641, and 4 Ch. 441.

tributors; and no allowance was made in the event of the inability of some of them to pay their shares. (a) But in equity, <sup>Rule in equity.</sup> those who could pay were compellable not only to contribute their own shares, ascertained as above, but also to make good the shares of those who were unable to furnish their contributions.<sup>1</sup> This rule also now prevails in all divisions of the High Court. (b) For example, if A., B., C., and D. are liable to a debt, A. can compel B. and C. to contribute one-third each, if D. can contribute nothing; and this, as between A., B., and C., is evidently only fair and just. (c)

In *Wadeson v. Richardson* (d), one of four partners assigned property to trustees upon trust, *inter alia*, to pay his proportion \*or share of all such debts \*770 <sup>Wadeson v. Richardson.</sup> as were or should be owing by him and his three co-partners. He and they afterwards became bankrupt; and it was held that the share and proportion of debts which the trustees were to pay was, not the share and proportion which, as between the assignor and his co-partners, he ought to contribute to the funds of the firm, but the share and proportion which, as between him and the creditors of the firm, it was necessary for him to pay, in order that they might receive twenty shillings in the pound. The creditors were therefore held entitled to come in under the deed for so much as they were not paid out of the partnership funds, and as they could not recover from the estates of the other partners.

(a) See *Cowell v. Edwards*, 2 Bos. & P. 268; *Batard v. Hawes*, 2 E. & B. 287.

<sup>1</sup>See *post*, 807, note.

One partner can maintain a bill in equity against all the others, within the jurisdiction of the court, to compel them to contribute to sums paid by him, although not at their request, for the use of the association, and the amount of the defendants' liability is to be determined by an apportionment among them of the amount paid, without regard to subscribers out of the jurisdiction. *Whitman v. Porter*, 107 Mass. 522.

A court of equity will entertain a bill by a part of the members of an insolvent voluntary association (making all the solvent members parties) whose assets have all been disposed of, for an ac-

count, and to compel each solvent member to pay his *pro rata* share of the indebtedness. The defendants in such case have no right to require that the complainants shall first pay the debts and take their risk of making the defendants contribute. *Hodgson v. Baldwin*, 65 Ill. 532.

(b) Jud. Act, 1873, §§ 24 and 25.

(c) *Dering v. Winchelsea*, 1 Cox, 318; *Hole v. Harrison*, 1 Ch. Ca. 246; *Peter v. Rich*, Rep. in Ch. 19. This rule does not apply where it is inconsistent with an express agreement between the parties: where there is such an agreement the extent of liability depends on its terms. See *McKewan's case*, 6 Ch. D. 447.

(d) 1 V. & B. 103.

So, where a loss has been incurred under circumstances which render it wholly chargeable to the account of the partner who caused it, yet, so far as he is unable to make it good, it must be borne rateably by the other partners. (*e*) Upon the same principle, when a company is being wound up, the solvent shareholders must, if their liability to creditors is not limited, contribute whatever may be necessary to pay all the creditors in full; and must make up rateably amongst themselves what ought to have been contributed by those shareholders who are insolvent (*f*); and this holds even where the creditors are themselves shareholders, and where the liability of the shareholders is as between themselves proportionate to their shares. (*g*)

Rule applies where one partner ought to indemnify the rest; and to the winding up of companies.

### *Of contribution between wrong-doers.*

There is a saying that there is no contribution amongst wrong-doers (*h*),<sup>1</sup> but this doctrine is certainly inapplicable to partners in the general form in which it is enunciated. It is true, that if a partnership is itself illegal, no member of it can, in respect of any transaction tainted with the illegality which infects the firm, obtain relief against any other member; but \*771 there is no authority for saying that if one of the \*members of a firm sustains a loss owing to some illegal act not attributable to him, but nevertheless imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners. (*i*)

The claim of a partner to contribution from his co-partners in respect of a partnership transaction cannot be defeated on the ground of illegality, unless the partnership is

Application of doctrine to partners.

(*e*) See *Oldaker v. Lavender*, 6 Sim. 239; *Cruikshank v. McVicar*, 8 Beav. 117, 118.

(*f*) *Robinson's Ex. case*, 6 DeG. M. & G. 572.

(*g*) *Professional Life Ass. Co.* 3 Eq. 663, and 3 Ch. 167.

(*h*) *Merryweather v. Nixan*, 8 T. R. 186, and 2 Sm. L. C.; *Colburn v. Patmore*, 1 Cr. M. & R. 73; *A.-G. v. Wil-*

*son*, Cr. & Ph. 1.

<sup>1</sup> See this subject and its application to partnerships, considered in *Cooley on Torts*, 144-150.

(*i*) See, at law, *Betts v. Gibbins*, 2 A. & E. 57; *Adamson v. Jarvis*, 4 Bing. 66, and see in equity, *Lingard v. Bromley*, 1 V. & B. 114; *Baynard v. Woolley*, 20 Beav. 583; *Ashurst v. Mason*, 20 Eq. 225.

itself an illegal partnership (*k*); or unless the act relied on as the basis of the claim is not only illegal, but has been committed by the partner seeking contribution, under such circumstances that he must have known of its illegality. (*l*) In either of these cases he can obtain no assistance against his co-partners, and must abide the consequences of his own willful breach of the law.<sup>1</sup> Upon this ground it was often held (before it became lawful for partners to carry on the business of marine insurance) that if one of a firm of marine insurers paid money in respect of a loss insured against by the firm, he could not recover any part of the payment from his co-partners. (*m*)

But if the partnership is not itself illegal, and if the partner claiming contribution has not himself been knowingly guilty of a breach of the law, his claim will prevail, although the loss in respect of which it is made may have arisen from an unlawful act. This appears from *Campbell v. Campbell* (*n*), where Campbell v. Campbell. a firm of distillers had incurred a penalty in consequence of a purchase of illicit whiskey. The purchase was made by the managing partners; and one of the members of the firm, who took no part in its business, was entirely ignorant and innocent of what had been going on. The firm was convicted for the full amount of the penalties claimed; but the Crown, on being memorialized by the innocent partner and the principal of the acting partners, remitted the penalties except to the amount of 3000*l*. This sum was levied partly on the property \*of the \*772 firm and partly on that of the innocent partner only. He then claimed to have the whole of what he had been compelled to pay made good to him by his co-partners, on the ground that they alone had been guilty of the illegal purchases. The innocent partner obtained a verdict for the whole amount claimed, with interest; and his co-partners were adjudged liable, jointly and severally, to indemnify him. A motion for a new trial was refused. An appeal to the Lords was dismissed with costs, for technical reasons,

(*k*) As to which, see *ante*, p. 180.

(*l*) See *Adamson v. Jarvis*, 4 Bing. 66; *Betts v. Gibbins*, 2 A. & E. 57.

<sup>1</sup> A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling. Nor will it give relief to either partner against the other founded

on transactions arising out of such partnership, whether for profits, losses, expenses, contribution or reimbursement. *Watson v. Fletcher*, 7 Grat. 1.

(*m*) *Aubert v. Maze*, 2 Bos. & P. 370.

(*n*) 7 Cl. & Fin. 166. See, too, *Woolley v. Bate*, 2 Car. & P. 417; *Pearson v. Skelton*, 1 M. & W. 504.

to which it is not necessary to allude; but the Lord Chancellor, in giving the judgment of the House, expressed a strong opinion that the defense of illegality which was set up could not be supported. His Lordship said, "If this objection could prevail, that because these parties were all guilty of a common offense, therefore out of such a transaction no contribution could arise, it would be an answer to him (*i.e.*, the innocent partner) if he had paid the whole, and demanded contribution only against the other parties."

Again, where a company had illegally commenced business before the amount of capital required by statute to be paid up had been paid up, it was held that the shareholders were nevertheless liable amongst themselves to contribute to the discharge of the debts of the company. (*o*)

The case which presents most difficulty is one in which an unlawful act has been knowingly performed by all the partners, so that all are *in pari delicto*. There is a dictum of Lord Cottenham to the effect that in such a case each partner must bear all the loss he may happen to sustain, and that he cannot require his co-partners to share that loss (*p*); but, on the other hand, there is a decision which goes far to show that the loss ought to be apportioned between all the partners, unless the illegal act in question is a pure tort (*q*), or a direct violation of some statute, or unless the contract of partnership is itself void on the ground of illegality. It is apprehended that if all the members of a firm were equally guilty of a breach of trust, and one of the firm alone had made it good out of his own moneys, he would be allowed, in taking the partnership accounts, to charge his co-partners, rateably with himself, with the amount paid by him. (*r*)

### *Of contribution between directors inter se.*

The right of directors to contribution *inter se*, as distinguished from their right to indemnity by the company has not been much discussed. The principles, however, already examined will be found applicable to cases of this description, which, it may be ob-

(*o*) *Ex parte Longworth's Executors*, Johns. 465, and on appeal, 1 DeG. F. & J. 17.

(*p*) See *A.-G. v. Wilson*, Cr. & Ph. 1.

(*q*) See *Baynard v. Wooldy*, 20 Beav. 583.

(*r*) See *Ashurst v. Mason*, 20 Eq. 225, noticed *ante* p. 597.

served, can seldom if ever arise, except where the directors have sustained some loss or incurred some liability which they are not entitled to throw upon the company at large. In such cases two questions naturally arise; viz., 1. Are all the directors, or some of them only, liable to indemnify the company? 2. Are all those who are liable to indemnify the company equally liable as between themselves, or are of some of them bound to indemnify the others?

1. With respect to the liability to the company, it follows from the doctrine that directors are trustees (s), that all of them who are parties or privies to a breach of trust are jointly and severally responsible for it; and this inference is warranted by those cases in which directors have been held liable for the misapplication of the funds of companies. (t)

2. As between themselves, the right of one director to be indemnified by another in respect of acts for which both are liable to third persons, depends upon the authority which he who did the acts had from the others, and upon the benefit derived from those acts. A director who has neither authorized nor derived benefit from what has been done, is not only not bound to indemnify the others, but is himself entitled to indemnity by those who have; and they, as between themselves, must share the loss equally or in proportion to the benefits they have received, as the case may be, unless they \*come within the \*774 rule, according to which relief to one wrong-doer as against another is refused. (u)

1. Liability to the company.

2. Liability inter se.

## SECTION II.—OF COMPENSATION FOR TROUBLE.

Under ordinary circumstances the contract of partnership excludes any implied contract for payment for services rendered for the firm by any of its members. (x) Consequently, under ordinary circumstances, and in the absence of an agreement to that effect, one partner cannot charge

Partner not entitled to charge firm for his services.

(s) *Ante*, p. 587, *et seq.*

(t) See, *ante*, p. 592, and in particular, *Evans v. Coventry*, 8 DeG. M. & G. 835, and 2 Jur. N. S. 557.

(u) See *Ashurt v. Mason*. 20 Eq. 225, noticed *ante*, p. 597. See, also, *Wilson*

*v. Goodman*, 4 Ha. 54, and *Lewin on Trusts*, 744, ed. 6.

(x) *Thompson v. Williamson*, 7 Bli. N. S. 432, *per Lord Wynford*; *Holmes v. Higgins*, 1 B. & C. 74.

his co-partners with any sum for compensation, whether in the shape of salary, commission, or otherwise, on account of his own trouble in conducting the partnership business (y);<sup>1</sup> and in this re-

(y) As to a charge of commission by a ship's husband, see *Miller v. Mackay*, 31 Beav. 77.

<sup>1</sup> See, *post*, page 837, note.

A partner is not entitled to charge the firm for his services in the partnership business, unless there is a special agreement to that effect, or unless such an agreement can be implied from the course of dealing among the partners, or from the nature of the service performed. *Caldwell v. Leiber*, 7 Paige, 483; *Lewis v. Moffet*, 11 Ill. 392. *Phillips v. Turner*, 2 Dev. & Bat. Eq. 123; *Cunliff v. Dyerville*, etc. Co. 7 R. I. 325; *Reybold v. Dodd*, 1 Harr. 401; *Lyman v. Lyman*, 2 Paine, 11; *Zimmerman v. Huber*, 29 Ala. 379; *Levi v. Karrick*, 13 Iowa, 344, *Bevans v. Sullivan*, 4 Gill, 383; *Bennett v. Russell*, 34 Mo. 524; *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Dougherty v. Van Nostrand*, 1 Hoffm. 68; *Buford v. Neely*, 2 Dev. Eq. 481; *Anderson v. Taylor*, 2 Ired. Eq. 420; *Butler v. Lemley*, 5 Jones Eq. 148; *Drew v. Ferson*, 22 Wis. 651; *King v. Hamilton*, 16 Ill. 190; *Roach v. Perry*, id. 37; *Coddington v. Idell*, 29 N. J. Eq. 504; *Boardman v. Close*, 44 Iowa, 428; *Farrer v. Farrer*, 29 Gratt. 134; *Lee v. Lashbrooke*, 8 Dana, 214; *Mills v. Fellows*, 30 La. Ann. 824; *Heath v. Waters*, 40 Mich. 457; *Franklin v. Robinson*, 1 John. Ch. 165; *Bennett v. Russell*, 34 Mo. 524; *Cameron v. Francisco*, 26 Ohio St. 190; *Coursen v. Hamlin*, 2 Duer, 513; *Gilhooly v. Hart*, 8 Daly, 176; *Kimball v. Lincoln*, 5 Bradw. (Ill.) 316.

A partner in the purchase and permitting of lands, who by agreement puts his personal services against the furnishing of capital by his co-partner, has the right to charge against the partnership any sums necessarily ex-

pended by him for the personal services of others in and upon the common property. *Burleigh v. White*, 70 Me. 130.

Thus, a co-partner has no claim against the other member of the firm, for personal services in preparing and superintending a mill for the firm, where it is not shown that such services were outside of the joint dealings of the firm; and it does not affect such a claim that the title to the land on which the mill is located is in said other member of the firm. *Cunliff v. Dyerville*, etc. Co. 7 R. I. 325.

An attorney at law, who is also a partner of a mercantile firm, is not entitled to charge commissions for collecting the notes and accounts of that firm as against his co-partner, in the absence of any special agreement to that effect; the legal presumption is that he was to collect the debts due the firm, as a partner, for the benefit of the concern. *Vanduzer v. McMillan*, 37 Ga. 299.

In an action for the liquidation of the affairs of a partnership, when one partner, the plaintiff, sets up a claim under express contract for compensation for extra services or labor, testimony is inadmissible to prove the value of the services of the other partner, under a claim by reconvention on a *quantum valebant*. *Hill v. Matta*, 12 La. Ann. 179.

In an agreement of co-partnership between two, U. and W., "U. bargains and agrees to give the said W. \$450 to manage the business." *Held*, that this salary must be paid out of the co-partnership funds. *Weaver v. Upton*, 7 Ired. L. 458.

Where a person entered into partnership with several other persons for the purpose of erecting a dam and mill, and after having spent some money and

spect a managing partner is in no different position from any other partner. (z) Upon the same principle it has been held, that in taking the accounts of three partnerships, viz., of the firm A. and B., of

several months' work, left the partnership without reasonable cause for dissatisfaction: *Held*, that this was a dissolution of the partnership, and that though he could claim no specific interest in the mill, which had been finished by the remaining partners, he might recover a fair compensation for the money he has advanced and the work he had done. *Beaver v. Lewis*, 14 Ark. 138.

By one of the articles of a partnership agreement, a partner bound himself "not to take out of the business or stock in trade of the partnership more than \$700 per annum in goods or money, or both:" *Held*, that this article could not be construed as an agreement that this partner should have a salary of \$700 per annum, in consideration of his giving his attention to the business of the firm. It was evidently designed to protect the capital from diminution during the continuance of the firm, and the authority to draw annually a sum not exceeding \$700 was to be regarded as a restriction on the rights of the partner to appropriate beyond that amount his proportion either of the capital or profits until the partnership should expire. *Trump v. Baltzell*, 3 Md. 295; S. C. 1 Md. Ch. 517.

Where the articles of partnership provided that the active partner should be entitled to one-fourth of the net profits, and, if his share did not amount to \$3,000 at the end of any one year, that the other partner should pay him whatever sum might be necessary to make up that amount; that each partner might invest in the partnership, as capital, an amount not exceeding \$10,000, but should not draw out during the year,

without the consent of his co-partner, any portion of the capital thus invested; that each might from time to time draw out of the money of the partnership, for his private use, a specified sum per month, and that the books should be balanced and a balance-sheet made out at the end of each year: *Held*, that the resident partner was entitled to receive \$3,000 at the end of each year, although the business of the year resulted in a loss to the firm, and that although he allowed his share of the profits, at the end of the first year to remain to his credit on the books of the firm, it was not thereby invested in the partnership, but remained his private property, and might be used or withdrawn by him at any time. *Dumont v. Ruepprecht*, 38 Ala. 175.

A made a written agreement, dated February 1, 1869, with B and C, partners, to work for the firm during the ensuing year for a salary of \$1,800, and, in addition, one-fourth of the net profits of the business, and that in computing these profits no deduction should be made for bad debts, but interest on the capital, which was wholly furnished by B and C, should be deducted. In an action by A against them to recover his one-fourth, they offered evidence to show that he had worked for them during the year preceding February 1, 1869, under a written agreement for a salary of \$1,800, and, in addition, one-fourth of the net profits; that for said year they received for their own salaries from the net profits the sum of \$3,300; and that articles of partnership, dated February 1, 1869, were entered into between them, containing a provision

(z) *Hutchinson v. Smith*, 5 Ir. Eq. 117. There a managing partner was

disallowed all salary, commission and compensation for *treating* customers.

its successors, A., B., and C., and of *its* successors B. and C., this last firm could not charge a commission for collecting the debts due to the two preceding firms. (a) So, a partner employed to buy or sell goods for the firm, cannot charge it with any commission for so doing. (b)

which was known to him, that for the ensuing year B should have a salary of \$1,800 and C a salary of \$1,500, before determining the profits to be divided between them: *Held*, that the evidence was admissible, and, being uncontrolled, showed that the salaries of A, B and C were to be deducted from the gross profits, in order to determine the net profits in which A was to share. *Fuller v. Miller*, 105 Mass. 103.

In March, 1876, the plaintiff and defendant, having been doing business as a partnership for several years, agreed in writing to extend the partnership business another year, the plaintiff to receive \$1,500 salary, and "the profits of the business after that payment to be divided equally." Subsequently the plaintiff, by written indenture, assigned to defendant all interest, claim and demand to the goods belonging to the firm, "all and singular the debts and sums of money owing to the plaintiff severally or jointly with the defendant;" "also all and singular bills, bonds, specialties and writings whatsoever, for and concerning the debts of the late co-partnership;" and in consideration thereof the defendant covenanted to save the plaintiff harmless from all debts and liabilities of the firm; and thereupon the parties stipulated that the partnership be dissolved and the agreement of March, 1876, be cancelled: *Held*, that the plaintiff could not maintain an action at common law to recover for his services under the agreement of March, 1876, that having been cancelled, and that whatever remedy the plaintiff had was upon the covenants of the latter

indenture. *Wright v. Troop*, 70 Me. 346.

If, by the terms of a partnership agreement, each partner is to devote his whole time and labor to the business of the firm, pay his own personal expenses and receive an equal share of the profits, a partner who previously to the formation of the partnership, has entered into contracts and performed service in regard to them, which contracts became the property of the firm on its formation, is not entitled for compensation for such services; nor is he entitled to compensation for his services in closing up the affairs of the firm, after the purpose for which it was formed has been accomplished. *Dunlap v. Watson*, 124 Mass. 305.

The sickness of a partner is one of the risks incidental to partnership business, and does not give another partner any claim for personal services in conducting the entire business, if the partnership articles do not provide for any; where, therefore, a surviving partner procured from the executrix of the deceased, the transference to him of a certain partnership claim in compensation for his services in conducting the entire business during decedent's illness, and suppressed this claim from the inventory of the partnership estate: *Held* that this transaction operated as a fraud in law. *Heath v. Waters*, 40 Mich. 457.

Whether a partner is entitled to remuneration for services rendered the firm, depends upon the intention of the parties, an express agreement is not necessary, and in order to ascertain whether

(a) *Whittle v. McFarlane*, 1 Knapp, 311.

(b) See *Bentley v. Craven*, 18 Beav. 75.

Even where the amount of the services rendered by the partners is exceedingly unequal, still, if there is no agreement that their services shall be remunerated, no charge in respect of them can be allowed in taking the partnership accounts. In such a case the remuneration to be paid to either for personal labor exceeding that contributed by the other, is considered \*as left to the honor of the other; and where that \*775 principle is wanting, a court of justice cannot supply it. (c)

Rule applies\*  
though the  
partners may  
have worked  
unequally.

such compensation should be allowed, the circumstances which surrounded the parties, and their relative situations towards each other, should be considered. *Cramer v. Bachman*, 68 Mo. 310.

Defendant, a skilled culturist, entered into partnership with plaintiff for the growing of grapes and the manufacture of wine. Plaintiff purchased a tract of land for such purpose, an undivided one-half of which was to be deeded to defendant, the amount paid for same by plaintiff being refunded to him out of profits realized. Nothing further was agreed upon at the time of the formation of the partnership. Defendant built a dwelling-house and wine-cellar, expended labor and capital of his own, and made a fruitful vineyard and extensive orchard on the tract. Plaintiff was engaged almost exclusively in an independent business of his own. Subsequently defendant, dissatisfied with the failure of plaintiff to convey to him the undivided half of the premises, sent the key of the wine-cellar to the plaintiff, and made preparations to return to St. Louis, from whence he, at plaintiff's request had come, when plaintiff made the deed and handed defendant a written agreement, signed by himself alone, which writing gave recognition to the idea that defendant was entitled to remuneration for both prior and subsequent labors in the interest of the firm. This writing the defendant refused to sign, not regarding the compensation therein specified as sufficient, but returned again to his labors, in which he

continued until the present proceeding resulted in a decree for dissolution. A referee having been appointed, took an account and made report, which was approved, except in one particular, which was the allowance to defendant for services to the firm, there being no articles of co-partnership and no writing or express agreement for the allowance of such compensation: *Held*, that the allowance was properly made. *Cramer v. Bachman*, 68 Mo. 310.

If a partner is appointed agent of the firm for a special purpose, he has been held to be entitled to the usual compensation therefor. *Philip v. Turner*, 2 Dev. & Bat. Eq. 123; *Bradford v. Kimberly*, 3 John. Ch. 431.

Where a third person purchases half the share of a partner and becomes the general manager of the business, inasmuch as he is not in partnership with the partner who retains the original interest in the firm, he may, as against such partner, claim a reasonable compensation for his services. *Newland v. Tate*, 3 Ired. Eq. 226.

A partner is entitled to fair compensation for the services of his daughter, provided she was employed about the business and rendered valuable service; but the apprentices must be regarded as apprentices of the firm; and no charge can rightfully be made, save for their board, clothing, and other necessary expenses. *Zimmerman v. Huber*, 29 Ala. 379.

(c) See *per Wigram, V.-C.*, in *Webster v. Bray*, 7 Ha. 179. In that case

But where, as is usually the case, it is the duty of each partner to attend to the partnership business, and one partner in breach of his duty willfully leaves the others to carry on the partnership business unaided, they are, it would seem, entitled to compensation for their services.<sup>1</sup> In *Airey v. Borham* (*d*), two partners had agreed to devote their whole time to the partnership business; they quarreled, and one of them only afterwards attended to it; the partnership was ultimately dissolved, and an inquiry was directed for the purpose of ascertaining what allowance ought to be made to him for having carried on the business alone.

The rule, moreover, which precludes a partner from charging his co-partners with payment for his services, does not apply to services rendered in carrying on the business of the firm after its dissolution:<sup>2</sup> and it has been held that a surviving partner who carries on the business of the firm for the benefit thereof is entitled to remuneration<sup>3</sup> for his trouble in so doing (*e*); unless there be some special reason to the contrary,<sup>4</sup> as where he is the executor of his deceased partner (*f*)<sup>4</sup>

an allowance for trouble was made to the defendant, but it was offered by the plaintiff. In *Robinson v. Anderson*, 20 Beav. 98, which was a similar case, no allowance was offered, nor was any given by the Court.

<sup>1</sup> Where an attorney at law refuses to act as partner or to perform the functions of such in the prosecution of a cause which has been intrusted to his firm, and repudiates his obligations, he is not entitled to any part of the fees subsequently earned by his partners in the cause. *Denver v. Roane*, 99 U. S. 355.

On a settlement of the firm accounts, a partner is chargeable with the value of personal services withheld, although the

promise to render them was only a verbal one, and the partnership articles were in writing. *Marsh's Appeal*, 69 Pa. St. 30.

(*d*) *Airey v. Borham*, 29 Beav. 620.

<sup>2</sup> See, however, *Dunlap v. Watson*, *ante*, 774, note; also next note, *infra*.

(*e*) *Featherstonhaugh v. Turner*, 25 Beav. 382; *Brown v. DeTastet*, Jac. 284; *Crawshay v. Collins*, 2 Russ. 347. See, also, *Mellersh v. Keen*, 27 Beav. 242, where one partner became lunatic, and the business was continued by the others.

<sup>3</sup> A partner in the absence of an agreement for compensation, is not entitled to charge for services rendered in discharging his duties as a member of the firm; and it makes no difference

(*f*) *Burden v. Burden*, 1 V. & B. 172; *Stockon v. Dawson*, 6 Beav. 371.

<sup>4</sup> Where an intestate and his administrator had been partners in building a mill: *Held*, that the administrator had no right to retain of the assets for work done on the mill after the death of his intestate. *Shelly v. Hiatt*, 7 Jones L.

509.

A surviving partner, in the absence of any stipulation entitling him to compensation, being appointed receiver at his own instance, claiming the right to wind up the firm business, is entitled to no compensation as receiver. *Berry v. Jones*, 11 Heisk. 206.

In India an executor is allowed a percentage on the assets collected by him; and a surviving partner who is the executor of his deceased co-partner, has been allowed this percentage even on the amount due from the partnership to the estate of the deceased. (*g*)

whether the services are rendered before or after the dissolution of the firm. *Brown's Appeal*, 89 Pa. St. 139; *Cameron v. Francisco*, 26 Ohio St. 190; *Hellman v. Mendel*, 8 Am. Law Record, 360; *Kimball v. Lincoln*, 5 Bradw. (Ill.) 316. See *ante*, p. 774 and note.

Nor is the rule affected by the fact that the partner closing up the affairs of the firm after dissolution, is a special partner. *Hellman v. Mendel*, *supra*.

But where a surviving partner is under no obligation to continue the business, but does so at his own peril, if the representatives of the deceased partner elect to share in the profits, a reasonable allowance may be deducted from such profits as a compensation to the survivor for his services. *Cameron v. Francisco*, 26 Ohio St. 190.

Where a firm was dissolved by the death of one of its members, and the surviving partners, for the preservation of the good-will, and to enable the entire property and business of the firm to be sold as a going concern, continue to carry on the business at their own risk, until such sale was effected: *Held*, that the amount thus saved to the firm from the good-will was in the nature of profits, and that, on settlement of the partnership, an allowance might be made therefrom to the surviving partners for their services in continuing the business after dissolution. *Cameron v. Francisco*, 26 Ohio St. 190.

A surviving partner was held entitled to a reasonable compensation for his services in settling up the partnership business in *Royster v. Johnson*, 73 N. C. 474, and *Schenke v. Dana*, 118 Mass. 236.

*Contra*, unless stipulated for by contract. *Cooper v. Reid*, 2 Hill (S. C.), Ch. 549; *Cooper v. Merrihew*, Riley, Eq. 166; *Brown v. McFarland*, 41 Penn. St. 129; *Beatty v. Wray*, 19 Penn. St. 516; *Lyman v. Lyman*, 2 Paine C. C. 52.

In *Brown v. McFarland*, *supra*, it was held that the executor of a deceased partner can not employ the surviving partner for that purpose at the expense of the decedent's estate, unless he is expressly authorized so to do by the testator's will.

In *Schenke v. Dana*, *supra*, the surviving partner of a firm manufacturing weapons of war, was held entitled to compensation for his personal services devoted, with the assent of the administrator of the deceased partner, to finishing existing contracts with the government, and entering upon new ones, employing the patents and machinery of the firm.

In *Hite v. Hite*, 1 B. Mon. 177, it was held that compensation might be allowed to a surviving partner for performing perplexing and extraordinary services in settling the business of the firm, but only to an amount barely sufficient to remunerate him for services necessarily rendered.

Where a surviving partner continued the business after the death of his partner, and settled up the business of the concern, but no charge was made for compensation for such services until nearly six years after a settlement of accounts between the executors of the partners: *Held*, that such charge could not be allowed. *Patton v. Calhoun*, 4 Gratt. 138.

Where on the hearing of a bill in

(*g*) *Cockerell v. Barber*, 2 Russ. 585, and 1 Sim. 23.

Provisional committeemen, although they are not partners, are not, in the absence of a special agreement, entitled to remuneration from each other in respect of their services *\*776* \*in promoting the common object of all. (*h*) If, however, the company is formed, and is directed by its act, charter, or deed of settlement to pay the expenses incurred in its formation, a member of the company will be entitled to be paid for his time and trouble in forming the company. (*i*)

Rules as to  
promoters of  
companies.

Directors of companies are generally allowed compensation for their trouble by express agreement (*k*); but where there is no such agreement they cannot, without the sanction of the shareholders, charge the company anything for their services (*l*), nor are they entitled to extra remuneration for extra work. In the York and North Midland Railway Company *v. Hudson* (*m*), the defendant contended that he was entitled to certain shares of the company by way of remuneration for the great advantages he had conferred upon it, and for which, as he alleged, the shares in question would be a meagre and inadequate return. But the Court held this contention to be wholly inadmissible, observing that.

Allowances  
to directors.

York and  
North Midland  
Railway Com-  
pany *v. Hudson*.

chancery, praying for an account between partners, it appeared that, after one of the members of the firm had made a voluntary assignment of his estate to a trustee, for the benefit of his creditors, another member of said firm paid, out of the partnership funds, sundry liabilities and indorsements of the firm, and charged in his individual account the sum so paid, and also charged for his time and services in collecting and paying out said money, but did not further intermeddle with the partnership property, except to preserve it from injury: *Held*, that such charges were properly made, and should be allowed. *Utley v. Smith*, 24 Conn. 290.

Where a firm of attorneys made an agreement providing for a different mode of division of the fees in cases unfinished at the time of the death of either of them, from that adopted as to cases finished during their joint lives, the survivors are entitled to no allow-

ance for winding up the business other than their share of the fees as specified in said agreement. *Denver v. Roane*, 99 U. S. 355.

(*h*) *Holmes v. Higgins*, 1 B. & C. 74; *Goddart v. Hodges*, 1 Cr. & M. 33; *Wilson v. Curzon*, 15 M. & W. 532; *Parkin v. Fry*, 2 C. & P. 311.

(*i*) *Carden v. The Gen. Cemetery Co.* 5 Bing. N. C. 253.

(*k*) Where there is such an agreement they are entitled to their fees, although the company proves a failure, *Ex parte Johnson*, 27 L. J. Ch. 803. •

(*l*) *Dunstan v. Imperial Gas Co.* 3 B. & Ad. 125.

(*m*) 16 Beav. 485. See, too, *Evans v. Coventry*, 8 DeG. M. & G. 835, where directors were made to refund, with interest, the difference between what they were entitled to by the company's deed, and what they had voted themselves, and retained for their remuneration.

"When Mr. Hudson accepted the office of chairman, he knew that the salary was not more than 1*l.* per week, and yet he was content to give his services on that footing. He might possibly have considered that the station and influence acquired in the position of chairman of the York and North Midland Railway was a remuneration for the time and labor bestowed by him, even if his services were not paid by any salary at all; but whether this were so or not, it is the duty of every man who accepts any situation, to perform the duties of it thoroughly and entirely. If they require his whole time and attention, it is his duty to give that whole time and attention to the due discharge of them. This Court can never countenance a person who is placed in a fiduciary situation in retaining for his own benefit sums of money which have come to his hands, or have been acquired by him in that character, although the acquisition of those sums is due to his own exertions, on the suggestion that his services were worth more than what was paid for them, and that he was himself entitled \*to ascertain and determine the \*777 just measure of their value. If this principle were allowed, I know not what there would be to prevent any clerk from retaining the property of his master, on the plea that his master had not adequately rewarded his great and meritorious services." (n)

### SECTION III.—OF OUTLAYS AND ADVANCES.

In taking a partnership account, each partner is entitled to be allowed against the other everything he has advanced Outlays and advances made by one partner. or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought; and nothing is to be considered as his share but his proportion of the residue on the balance of the account. (o) Although, therefore, a partner is not entitled to compensation for trouble, he is entitled to charge the partnership with sums *bonâ fide* expended by him in conducting the business thereof. (p)<sup>1</sup> Thus, where the managing director of a cost-book mining company advanced Advances by directors.

(n) See, also, *Imperial Merc. Credit Assoc. v. Coleman*, L. R. 6 H. L. 189.

(o) *Per Lord Hardwicke in West v. Skip*, 1 Ves: S. 242.

(p) *Burden v. Burden*, 1 V. & B. 172, where a surviving partner, who was also executor, was allowed to charge expenses actually incurred, but not time and trouble. Compare *Hutcheson v. Smith*, 5 Ir. Eq. 117, *ante*, p. 774, note. (z)

<sup>1</sup>See *King v. Hamilton*, 16 Ill. 190; *Savage v. Carter*, 9 Dana, 408.

The defendant, while returning from California, was taken sick, and in consequence thereof was subjected to expenses and loss of time after his return: *Held*, that in accounting for the net earnings he was entitled to an allowance for the expenses, but not for the lost time: *Brigham v. Dana*, 29 Vt. 1.

Where it was provided in articles of

money for the purpose of enabling the business of the company to be carried on, he was held entitled to be reimbursed by the company, there being no question as to his authority to carry on the business on credit. (q) So, where the directors of a mining company advanced money to keep the mine at work, and it would

co-partnership, between the plaintiffs and defendants, that the services of one member of the firm, should be rendered at a stipulated price, and such partner incurred expenses in the appropriate business of the firm at Porto Rico; it was held, that such expenses were a proper charge against the co-partnership, and that he had not forfeited his right to the same, by withholding from the other members of the firm the proceeds of the partnership business, for the period of one month after his return to this country, and until requested by his co-partners to make a settlement of said business. *Pond v. Clark*, 24 Conn. 370.

A partner, though bound to transact the out-door business, and superintend the sale of all articles manufactured by the partnership, is entitled to credit for such charges for commissions to others for sales, as have been regularly entered on the books as a charge against the firm during its existence, unless the entries be made in error or fraud. It is the construction placed by the parties themselves on their contract. *Pratt v. McHatton*, 11 La. Ann. 260.

In a proceeding between partners to settle their accounts, items for clearing and improving their joint land, and for receipt of rents, should not be considered; such items should be settled upon a proceeding for partition. *Jones v. Jones*, 23 Ark. 212.

In such a proceeding the court refused to allow an individual demand of one partner against the other, any further than to extinguish a claim by the latter for partnership funds remaining in the former's hands. *Jones v.*

*Jones*, 23 Ark. 212.

Where a partner contracts in his individual name, and makes disbursements on account of such contracts, in a contest with his co-partners in settling the affairs of the co-partnership, he will be bound to prove that such contracts were made on account of, and for the benefit of the firm, in order to be allowed for his disbursements. *Rodes v. Rodes*, 6 B. Mon. 400.

A partner who undertakes to wind up the firm business, stands in the place of an executor, and can establish disbursements only by vouchers properly authenticated. *Clements v. Mitchell*, Phill. Eq. 3.

K. bought of F., for the account of himself and W., certain property, paying for it partly in cash, and partly by his notes, which were indorsed by W. The business of F. was continued by K. & W., and afterwards M. purchased a one-third interest in the partnership, being admitted from the date of the purchase, and signing his name to the notes previously given to F. W. paid one-third of the whole purchase-money, including the amount of the notes, to F., and K. paid the balance. Subsequently K. sold to W. & M. all his interest in the firm: *Held*, that if the excess paid by K. over his just proportion was an advance to the firm, his claim therefor was extinguished by the sale of his interest in the firm. If it was an advance to M., W. could not be liable in any way for it; consequently a suit against the firm to recover such excess must fail. *Kimball v. Walker*, 30 Ill. 482.

(q) *Ex parte Sedgwick*, 2 Jur. N. S. 949.

otherwise have been drowned, they were held entitled to be reimbursed, although they had no power to borrow money on the credit of the company. (r) And in another case, the directors of a company who borrowed money on their own responsibility, and *bond fide* applied it in keeping the company at work, were held to be creditors of the company for the amount expended, although the shareholders insisted that the directors had no power to borrow except upon mortgage, and under certain restrictions, to which no attention had been paid. (s) \*778

So a partner is clearly entitled to charge the firm with whatever he may have been compelled to pay in respect of its debts (t); or in respect of obligations incurred by him alone at the request of the firm, as where he is compelled to pay a bond given by himself alone, but for the benefit of the firm and as a trustee for it (u),<sup>1</sup> or where he sacrifices a debt due to himself in order to enable the firm to obtain a debt due to it. (v)

It need hardly be observed, that an outlay made by one partner with the approbation of his co-partners and for the benefit of the firm, must be made good by the firm, however useless the outlay may have been. For example, if a firm or company purchases a patent which is paid for by one member individually, he is entitled to charge the purchase-money to the firm or company, however worthless the patent may ultimately prove to be. (x) On the other hand, if a partner or director makes an improper outlay or advance on behalf of a firm or company, he cannot charge it to the firm or company, unless his conduct is ratified

(r) *Ex parte* Chippendale, 4 DeG. M. & G. 19. See *ante*, p. 760.

(s) *Ex parte* Bignold, 22 Beav. 143. See *ante*, p. 761.

(t) *Prole v. Masterman*, 21 Beav. 61. A partner who negligently pays a debt claimed, but not due, cannot charge the payment to the firm, *Re Webb*, 2 B. Moore, 500; *McIlreath v. Margetson*, 4 Doug. 278; noticed in the next section.

(u) *Croxton's case*, 5 DeG. & S. 432; *Sedgwick's case*, 2 Jur. N. S. 949. V.-C. W.; *Gleadow v. The Hull Glass Co.* 13 Jur. 1020, V.-C. E.

<sup>1</sup> Where, in the settlement of a partnership account, one partner claimed to be allowed \$500, which he had agreed

to pay to a third person for indorsing for the firm, the court refused to allow it, no proof being given that it had been actually paid. *Hutchinson v. Onderdonk*, 6 N. J. Eq. 277.

The items for which an allowance is claimed must be proved with reasonable certainty before any allowance can be made therefor. *Chandler v. Allen*, 20 Hun, 424.

(v) *Lefroy v. Gore*, 1 Jo. & Lat. 571, where one partner released a witness whose evidence was essential to the firm.

(x) *Gleadow v. The Hull Glass Co.* 13 Jur. 1020.

by it. This is well illustrated by the cases of *Gillan v. Morrison*, *Re The Worcester Corn Exchange Company*, and *Re Cropper*, already noticed. (y) But in connection with this subject the qualification rendered necessary by the principle established in the *German Mining Company's* case must not be lost sight of. (z)

An outlay which may have been very proper and even necessary for the conduct of the partnership business, cannot be charged to the partnership account, if so to do would be inconsistent with the agreement into which the partners have

\*779 \*entered. In *Thornton v. Procter* (a), the plaintiff and the defendant had become partners as wine merchants, and the plaintiff, who for some time had principally conducted the business, had expended considerable sums of money in treating customers, and this was found to be necessary in that trade. The plaintiff had for several years kept the accounts of the partnership, and in such accounts he never made any charge for entertaining customers, or demanded any allowance on that account. He, nevertheless, afterwards contended that he ought to be allowed, in taking the accounts of the partnership, to debit the firm with 50*l.* a year for entertainments, and this was proved to be a reasonable sum. But it was shown to be usual, in cases of this sort, to insert some special clause in the articles if an allowance was intended to be made, and the articles into which the partners had entered contained nothing more than a general stipulation, that all losses and expenses should be borne equally. It was accordingly held that the plaintiff was not entitled to any allowance, for he could only claim it as being a gross article of expenditure, and he was precluded from charging it in that way by not having included it in the yearly accounts.

A partner is not entitled to charge the firm with any moneys alleged by him to have been laid out for the benefit of the firm if he declines to give the particulars of his outlays; he cannot charge for secret service money (b)<sup>1</sup>,

No allowance for expenses unless proved to have been incurred.

(y) *Ante*, pp. 765, 767.

(z) *Ante*. p. 760.

(a) 1 Anstr. 94. See, too, *Hutcheson v. Smith*, 5 Ir. Eq. 117; *East India Co. v. Blake*, Finch, 117.

(b) See the *York and North-Midland Rail. Co. v. Hudson*, 16 Beav. 485.

<sup>1</sup> Upon a bill in equity between partners to wind up the partnership, one of them who neglects or refuses to account fully for business of the firm, done by himself in a foreign jurisdiction, cannot as a penalty, be denied his reasonable expenses of doing it, or sums otherwise

nor for general expenses. (c) Nor can a partner charge the firm with traveling expenses unless they have been *bonâ fide* and properly incurred by him when traveling for the purpose of transacting its business. (d)<sup>2</sup>

Again, a partner expending money for valuations to carry out a transaction between himself and co-partners, which they afterwards succeed in setting aside, cannot charge them with any part of what he may have so expended. (e)

Charges for valuation.

With respect to advances by directors, it has been held that \*if a loan is *bonâ fide* made by them to the company and the money advanced has been *bonâ fide* applied to the purposes of the company, the company must repay it. (f) But the attention of the shareholders should be specially called to the fact of a loan being made by the directors. The duties of directors and the interest of creditors may very possibly conflict with each other; and it is always suspicious when a director claims to be a creditor of the company entrusted to his care, in respect of a matter of which the shareholders know nothing. (g)

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Loans by directors.

Not only may one partner make outlays or advances for the benefit of the firm, but the firm may make advances and outlays to or for the benefit of one partner. Under ordinary circumstances such advances and outlays will be equivalent to a loan by the firm to him,

owing to him from the firm, or be charged with interest, with annual rests on actual or estimated balances in his hands; but in estimating the amount, expenses, and profits of such business, and computing interest on such balances, if any interest thereon is chargeable, care should be taken, by making presumptions in favor of his co-partners against him, to guard them from any injurious consequences of his concealment of facts. *Harvey v. Varney*, 104 Mass. 436.

(c) *The East India Co. v. Blake*, Finch, 117.

(d) *Stainton v. The Carron Co.* 24 Beav. 356.

<sup>2</sup> A partner who, on going abroad on business principally his own, received a compensation of \$5,000 for his services,

was not allowed to charge his expenses to his co-partner, who had, in the meantime, conducted the partnership business. *Mumford v. Murray*, 5 Johns. Ch 1.

(e) *Stocken v. Dawson*, 6 Beav. 375.

(f) See *ante*, p. 760. See, also, *Murray's Executors' case*, 5 DeG. M. & G. 750; *Ex parte Sedgwick*, 2 Jur. N. S. 949.

(g) As to loans by directors of companies governed by 7 & 8 Vict. c. 110, see *Baker's case*, 1 Dr. & Sm. 55; *Murray's Executors' case*, 5 DeG. M. & G. 750; *Teversham v. The Cameron's coalbrook, &c. Co.* 3 DeG. & S. 296, and *Bluck v. Mallalue*, 27 Beav. 398, in which last case there was an express authority to borrow from the directors.

and must be treated accordingly in taking the partnership accounts.

Outlays on  
separate prop-  
erty of one  
partner.

But occasionally considerable difficulty arises, *e.g.*, where there has been an outlay by the firm on property belonging exclusively to one of the partners, but used by the

firm for partnership purposes. In the absence of all evidence of any agreement upon the subject, justice seems to require that in taking the partnership accounts the owner of the property in question should not be allowed exclusively to gain the benefit of the outlay, but that the improved value of his property should be treated as a partnership asset, and be shared between him and his co-partners accordingly.

In *Burdon v. Barkus*, a managing partner had, with the knowledge of his co-partner, expended partnership monies in sinking a pit for partnership purposes on land which belonged exclusively to the latter partner; the managing partner had erroneously supposed that the partnership was for a term of years; but the partnership was suddenly and unexpectedly dissolved, and the pit thereby became the sole property of the \*781 \*partner in whose land it had been sunk; but an inquiry was directed whether any allowance should be made in respect of the outlay in sinking the pit. (*h*)

#### SECTION IV.—OF DEBTS, LIABILITIES, AND LOSSES.

In the absence of any agreement to the contrary, partners are liable to share losses in the same proportion as they are entitled to share profits. As a general rule, therefore, if one partner has been compelled to pay more than his share of a partnership debt, or if, in properly conducting the affairs of the firm, he has personally incurred a liability, he is entitled to be indemnified by his co-partners so far as may be necessary to place all on a footing of equality. (*i*)

But it by no means follows, that a person liable to be sued as if he were a partner, is, as between himself and his co-partners, bound to share the losses of the firm; for his

(*h*) *Burdon v. Barkus*, 3 Giff. 412, aff. on appeal, 4 DeG. F. & J. 42.

(*i*) *Wright v. Hunter*, 5 Ves. 792; and see *Robinson's Executors' case*, 6 DeG.

*M. & G.* 572; *Lefroy v. Gore*, 1 Jo. & Lat. 571, and *Hamilton v. Smith*, 7 W. R. 173, as to promoters of companies.

co-partners may have agreed to indemnify him altogether from losses, and if such is the case, they cannot require him to contribute thereto with them. (*k*) So, where the promoters of a company agree with the shareholders that certain preliminary expenses to be incurred in obtaining surveys, reports, &c., shall not exceed a certain sum, and the promoters spend more than that sum, they cannot require the shareholders to make good the difference; although the extra expenditure may have been caused by circumstances which were unforeseen, and over which the promoters had no control. (*l*)

The general principle, however, that partners must contribute rateably to their shares towards the losses and debts \*of the firm is not open to question. \*782 General obligation of partners to contribute to losses. Their obligation to contribute is not necessarily founded upon, although it may be modified and even excluded altogether by, agreement. (*m*)<sup>1</sup> For example, where there is no agreement to the contrary, it is clear that if execution for a partnership debt contracted by all the partners, or by some of them when acting within the limits of their authority, is levied on any one partner, who is compelled to pay the whole debt, he is entitled to contribution from his co-partners. (*n*) So, if one partner enters into a contract on behalf of the firm, but in such a manner as to render himself alone liable to be sued, he is entitled to be indemnified by the firm, provided he has not, as between himself and his co-partners, exceeded his authority in entering into the contract (*o*); and

(*k*) See *Geddes v. Wallace*, 2 Bli. N. S. 270.

(*l*) *Gillan v. Morrison*, 1 DeG. & S. 421; *Re The Worcester Corn Ex. Co.* 3 DeG. M. & G. 180, noticed more fully, *ante*, p. 765. See, too, *Mowatt and Elliott's case*, 3 DeG. M. & G. 254, and *Carew's case*, 7 ib. 43.

(*m*) *Ante*, p. 754.

<sup>1</sup> Losses sustained to stock in trade or partnership assets purchased with the money of the firm, must be borne by the firm. *Savery v. Thurston*, 4 Bradw. (Ill.) 55.

A and B entered into partnership for manufacturing purposes, under an agreement that the former should furnish all capital necessary for the purchase of machinery and material, and

for carrying on the partnership business; that the latter should superintend the business, and that all losses should "be borne equally by them." A purchased certain real estate, taking the title in himself, and erected thereon the necessary buildings and machinery at his own expense. The machinery was damaged by fire: *Held*, that this loss was to be shared. *Carlisle v. Tenbrook*, 57 Ind. 529.

(*n*) *McOwen v. Hunter*, 1 Dr. & W. 347; *Evans v. Yeathard*, 2 Bing. 132; *Robinson's Executor's case*, 6 DeG. M. & G. 572. See, too, *Lefroy v. Gore*, 1 Jo. & Lat. 571, as to provisional directors.

(*o*) *Gleadow v. The Hull Glass Co.* 13 Jur. 1020; *Sedgwick's case*, 2 Jur. N. S. 949.

if, in such a case, he with their knowledge and consent defend an action brought against him, he is entitled to be indemnified by the firm against the damages, costs, and expenses which he may be compelled to pay. (*p*)<sup>2</sup>

The right of a public officer of a banking company to be indemnified by the members of the company against judgments obtained against himself is recognized by statute (*q*); and the right of each individual shareholder, against whom execution may have issued for a debt of the company, to indemnity from the company, or to contribution from his co-shareholders, is also placed beyond a doubt by legislative enactment (*r*), except in the case of companies governed by the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73, which is silent upon this point. This Act provides for limited liability, but does not enact that if one member of a company governed by it pays more than his share of a debt of the company, he is to be reimbursed by the company or the other shareholders; but his right to such indemnity or contribution is nowhere taken away, and may therefore be assumed to exist by virtue of general principles not touched by the statute.

Even if a loss sustained by a firm is imputable to the conduct of one partner more than to that of another, still, if the former acted *bonâ fide* with a view to the benefit of the firm, and without culpable negligence, the loss must be borne equally by all.<sup>1</sup> Thus, where A. represented to his co-partner B. that shares in a certain company rendered the holders only liable to the engagements of the com-

Losses attributable to one partner more than to another.

Ex parte Lettis.

(*p*) *Browne v. Gibbins*, 5 Bro. P. C. 491; *Croxton's case*, 5 DeG. & S. 432.

<sup>2</sup> See *ante*, 759, *et seq.* and notes

(*q*) 7 Geo. 4, c. 46, § 14.

(*r*) 7 Geo. 4, c. 46, § 14; 8 & 9 Vict. c. 16, § 37. See, also, the repealed acts, 7 & 8 Vict. c. 110, § 67, and 7 & 8 Vict. c. 113, § 14.

<sup>1</sup> Where a loss accrues to a partnership while the business is under the sole management of one of the partners, this fact alone is not sufficient to charge him with the whole loss, but it must appear to have accrued by his fault *McCrae v. Robeson*, 2 Murph. 127.

Where it is the understanding between the partners, upon a dissolution,

that the affairs shall be settled by one partner, another partner will not be chargeable with the value of property delivered by him to the acting partner. *Allison v. Davidson*, 2 Dev. Eq. 79.

One partner, closing up the business of the concern, is a trustee for the others, and will not be treated as a debtor to his co-partners for the balance of funds in his hands, so as to throw upon him a loss by depreciation in the currency at the time when he received the funds. *McNair v. Rayland*, 1 Dev. Eq. 516.

The mere fact that one of the partners acts as the cashier to the firm will not, as a general rule, charge him with the funds he might receive and disburse in

pany to a limited extent, and B. thereupon, and at A.'s request, authorized him to take shares on the partnership account, and it ulti-

the course of business; otherwise, when fraud is charged. *Walpole v. Renfroe*, 16 La. Ann. 92.

A clerk of a partnership being an accredited agent of the firm, losses growing out of his defalcation, negligence, etc., would fall on the firm, and not individually on the active partner. *Roberts v. Totten*, 13 Ark. 609.

Where a partner leaves the place of business of the firm to attend to private business of his own, and also to purchase merchandise for the firm, with money of the firm, which he takes with him, and neither he nor the money is heard of afterwards, the loss of the money, in the absence of evidence showing fraud, negligence, or misconduct, must fall upon the partnership. *Jenkins v. Peckinpaugh*, 40 Ind. 133.

Where articles of a tannery co-partnership provided that one partner should exclusively superintend the tannery, and the other the books and financial affairs, and neither intermeddle with the proper business of the other, losses caused by a violation of such provision must be borne by the intermeddling party; but where a loss arose from the employment, by the bookkeeping partner, of an inexpert artisan to build vats, on proof that the yard partner knew and assented to the act, equity will consider the provision waived. *Haller v. Wilamowicz*, 23 Ark. 566.

Plaintiff agreed to furnish the entire capital of a partnership, out of which defendant was to manage the concern, and receive one-third of the profits, with a monthly sum for his personal expenses. From plaintiff's failure to advance the entire capital, the partnership was dissolved, with a loss equal to the amount advanced: *Held*, that defendant was not bound for any part of the loss, nor the amounts withdrawn for

his monthly expenses. *Bonis v. Luvrier*, 8 La. Ann. 4.

One partner is liable to his co-partner for any loss occasioned by his unauthorized indorsement of a note in the name of the partnership, although the note be afterwards paid by the firm. *Smith v. Loring*, 2 Ohio, 440.

Where a party having the legal title agrees with another to convey him one-half of the title, in consideration of his completing a mill upon the property, and afterwards takes charge of and completes the work, if he rents the mill or could have done so, and refuses or neglects when good, responsible tenants can be had, he will be required to account to the other party for half of a fair rent. *Grove v. Miles*, 85 Ill. 85.

A partner who purchases for the firm a large lot of hogs at a price prohibited by the partnership agreement is liable to the other partners for the excess. *Lovney v. Gillenwaters*, 11 Heisk. 133.

A partner depositing or holding partnership funds, to compel his co-partner to have an account taken, is not liable to make good to him a loss thereof, ensuing through no fault of his own. *Morrison v. Smith*, 81 Ill. 221.

If one or more of the members of a firm divert the funds of the firm to other uses, such partner is liable, in making up the account, to be charged with all the detriment thus suffered by the firm. *Pierce v. Daniels*, 25 Vt. 624.

Where, for the convenience and by the consent of the firm, one partner deposits the funds of the firm in his own name and to his own account, and they are charged upon the firm books to such partner, in order to indicate in whose hands they are, but are not under the exclusive control of the partner in whose name they are deposited, the other partner procuring checks at all times when

mately turned out that the liability of the shareholders was not limited, and A. and B. were made contributories, it was held that,

desired for use in the business of the firm, the firm, and not the partner holding the funds, must bear the loss resulting from the insolvency of the bank in which they were deposited. *Campbell v. Stewart*, 34 Ill. 151.

Where, however, one partner mixes partnership funds with his own, makes deposits of them in bank in his own name, appropriates them to his own use, assuming the absolute and entire control, and the bank becoming insolvent, receives its notes, and has them registered in his own name, without the consent or knowledge of his co-partner, by reason whereof the partnership funds are lost, such partner is responsible to the co-partner for his share of the fund, and must bear the loss alone. *Lefever v. Underwood*, 41 Pa. St. 505.

Where a partnership intrusts money to a member of the firm to be used in the partnership business, and such member, without the knowledge or consent of his co-partners, forms a new partnership relation with another person to engage in like business, and pays over the money to the new firm, whereby it is lost, he thereby becomes liable to account to the members of the old firm, as for money converted to his own use. *Reis v. Hellman*, 25 Ohio St. 180 ; S. C. 1 Cincin. 30.

Where two members of a partnership, formed for the purpose of speculating in lands, loaned money of the firm, in good faith, to a manufacturer as an inducement to establish mills on their lands, whereby the lands were expected to be enhanced in value, and afterwards the mills proved a bad enterprise and a part of the debt was lost, a court of chancery refused to relieve a third partner, who did not assent to the loan, from bearing his share of the loss. *Blair v. Johnston*, 1 Head, 13.

When a partner quits the partnership that he may buy for himself what the partnership has a right to purchase, or that he may make a profit for his own advantage, and to their prejudice, he is answerable to the community for the loss and damage; and so, if he quits at an unreasonable time, which occasioned a deprivation of profits to the community, he must repair and make good such loss. *Howell v. Harvey*, 5 Ark. 270.

A culpable neglect in one partner, in pursuing the claims of the concern, may render him liable to the other partner for the amount which has been lost by his neglect. *Jessup v. Cook*, 6 N. J. L. 434.

Where it does not appear to have been more the duty of one partner than another to collect debts due to the partnership, and the partner who undertakes to collect them has placed them in the hands of a competent attorney, and has acted in good faith, he ought not to be held responsible for the negligent or irregular acts of such attorney (or other competent agent), although the suit was brought in the name of the individual partner instead of the names of the joint owners. *Aiken v. Ogilvie*, 12 La. Ann. 353.

Where a partnership has been dissolved, in making up the account, one partner cannot be charged with debts due to the concern, because he has not collected them, or because he refused to permit them to be set off against debts due from the other partner. *Hollister v. Barkley*, 11 N. H. 501.

The fact that the books of a partnership remain, after a dissolution, in the hands of one of the partners, does not, in the absence of a special undertaking to collect the debts, render him liable to his co-partner, for omitting to collect a

as between themselves, B. could not throw the loss on A. alone. (s) Again, in *Cragg v. Ford* (t), the plaintiff and the defendant were partners, and the defendant was the managing partner. The partnership was dissolved, and the winding up of its affairs devolved on the defendant. Part of the assets consisted of bales of cotton, and the plaintiff requested that these might be immediately sold. The defendant, however, delayed to sell them, and they were ultimately sold at a much lower price than they would have fetched if they had been sold when the plaintiff desired. The plaintiff contended that the loss sustained

*Cragg v. Ford.*

debt. *McRae v. McKenzie*, 2 Dev. & B. Eq. 232.

The unsettled claims of a co-partnership, shortly after its dissolution, were, by the mutual consent of the partners, placed for collection in the hands of G., who after collecting a part of them, paid over all the proceeds except \$100 to the defendant, and the court found that the plaintiff had received more than his share of the partnership property, and the defendant afterwards requested G. to suspend making further collections, that his account might be made up, and a settlement made by the auditors, who were then investigating the partnership account; and that in consequence of misunderstanding the object and purport of the request, G. ceased making further collections, and some of said claims became uncollectible: *Held*, that the directions given by the defendant to G. did not render him liable for any loss which might result from suspending such collections, and that the defendant was not chargeable with the money and accounts in the hands of G. *Day v. Lockwood*, 24 Conn. 185.

F. owed T., and gave him a note for \$7,000. The firm of T. and W. made large advances to F. on his individual credit. For greater security a letter of credit to T. and W. was procured by F. from V. and O., on which T. and W. made other advances to F., amounting to about £760. These they charged to

F., V. and O. jointly. V. delivered provisions, etc., sufficient to pay the debt charged jointly against V., O. and F., and he expected they would be so applied, but F. and W. credited them to F. *individually*, and certain other payments made were so credited by T. and W., who found in July, 1799, that the sum credited F. *individually* exceeded his individual liability by some £1,200, an amount more than sufficient to discharge the joint debt due from F., V. and O. Against the remonstrance of his partner (W.) T. applied £800 of this £1,200 on the \$7,000 note due him personally from F., and suffered the joint debt against F., V. and O. to become barred by the statute of limitations, and lost. In an action for an account, etc., between the partners (W. v. T.): *Held*, that because the defendant T. had misapplied the provisions delivered to the company to pay the joint debt, to the payment of a private debt due from F. to him personally, and had then suffered the joint debt to become barred by the statute of limitations, and lost, the amount of such joint debt remaining unpaid was a proper charge in favor of W. and against T. *Tomlinson v. Ward*, 2 Conn. 396.

(s) *Ex parte Letts and Steer*, 26 L. J. Ch. 455. See, too, *Lingard v. Bromley*, 1 V. & B. 114.

(t) 1 Y. & C. C. C. 280.

by the postponement of the sale ought to be borne by the defendant alone. But the Court held that the plaintiff, if he had chosen, might himself have sold the cotton; and that, as the defendant, in delaying the sale, had acted *bonâ fide* and in the exercise of his discretion, the loss ought not to be thrown on him alone, but ought to be shared by the plaintiff.

But if a partner is guilty of a breach of his duty to the firm, and loss results therefrom, such loss must fall on him alone.<sup>2</sup> As was said by the Court in *Bury v. Allen* (u), "Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partner-

\*784 ship to the damage of its \*property or interests, in breach of his duty to the partnership: whether at law compellable, or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect." In conformity with this rule, the justice of which cannot be disputed, it has been decided that if a claim is made against a firm for payment of a debt alleged to be due from it, but which is not so in point of fact, and one partner chooses to pay it, he cannot charge such payment to the account of the firm. (x) So, if one partner does that which, though imputable to the firm on the principles of agency, is in truth his act alone, and a fraud upon his co-partners, they are entitled, as between themselves and him, to throw the whole of the consequences upon him. (y) So, if one partner, without the authority of his co-partners, wilfully does that which is illegal, he must indemnify them from the consequences. (z)

When it is said that losses incurred by the unauthorized, culpably negligent, or fraudulent conduct of one partner must be borne by him alone, it is assumed that his conduct has not been ratified by the firm, and that the loss

Adoption by  
firm of losses  
not chargeable  
to it.

<sup>2</sup>See *Murphy v. Crafts*, 13 La. Ann. 519, and the cases cited in the next note above.

The obligations of one partner to another, in the management of the partnership business, is the exercise of good faith, and of ordinary care and prudence, and, if loss happens through the ordinary negligence of a partner, he must bear the loss. *Carlin v. Donegan*, 15 Kan. 495.

(u) 1 Coll. 604.

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(x) *Re Webb*, 2 B. Moore, 500; *McIlreath v. Margetson*, 4 Doug. 278, where a payment was made *bonâ fide* and on the faith of false and fraudulent representations. *Quære* if the same rule would apply if the debt being due was barred by the statute of limitations. See *Stahlschmidt v. Lett*, 1 Sm. & G. 415.

(y) See *Robertson v. Southgate*, 6 Ha. 540.

(z) See *Campbell v. Campbell*, 7 Cl. & Fin. 166, *ante*, p. 771.

has not been treated by the partners themselves as a partnership loss. A loss which is properly chargeable to the account of one partner only, becomes chargeable to the firm if the partners have knowingly allowed it to be so charged in their accounts, and have thus taken it upon themselves. A strong instance of this is afforded by the case of *Cragg v. Ford* (a), already referred to on another point. There the plaintiff and the defendant were partners; the defendant had engaged in adventures not authorized by the partnership articles. The plaintiff protested against this, but although the adventures ended in loss, and that loss was charged against the firm in the partnership \*books, the plaintiff did not at the time object, or insist \*785 that the loss should be borne by the defendant. When, however, the partnership was dissolved, and its accounts were made up, the plaintiff refused to allow the losses in question to be charged against the firm. But the Court held that, under all the circumstances of the case, the Master who had charged the losses against the partnership had not done wrong; and exceptions which had been taken to his report by the plaintiff were overruled.

*Cragg v. Ford.*

It has been already pointed out that directors of a company are as between themselves and the company trustees with large discretionary powers (b); and that whilst on the one hand they are liable for losses arising from acts which are not warranted by their trust, and for losses arising from their own culpable negligence (c), they are on the other hand not liable to indemnify the company from losses arising from acts done by them *bonâ fide*, and within the scope of their authority (d). The decisions which tend to show that directors acting *bonâ fide*, but beyond their powers, are entitled to indemnity from the shareholders, have also been noticed. (e) It remains therefore merely to add in this place that if losses not properly chargeable to the company or the shareholders, without their consent, are charged to them in the accounts and reports in such an open and fair way as to enable them to see and understand what is done, and these accounts and reports are not objected to, but are, on the contrary, approved

Application of the foregoing principles to companies.

(a) 1 Y. & C. C. C. 285; but see as to losses arising from illegal acts, the observations of Lord Eldon on *Watts v. Brook*, in *Aubert v. Maze*, 2 Bros. & P. 371.

(b) Book iii. c. 2, § 3, *ante*, p. 587, *et seq.*

(c) *Ante*, p. 592, 593.

(d) *Ante*, p. 760.

(e) *Ante*, p. 760.

and adopted by the shareholders, it will be too late for them afterwards to dispute the propriety of what they may thus have sanctioned. (*f*) Moreover, those shareholders who do not choose to attend meetings of which they have notice, cannot complain of their ignorance of what they might have known had they attended. (*g*)

The principles upon which, in taking partnership accounts, interest is allowed or disallowed, do not appear to be well settled. The state of the authorities, is, in fact, not such as to justify the deduction from them of any general principle upon this important subject.

By the common law, in the absence of a special custom or agreement, a loan does not bear interest (*h*); and, notwithstanding many dicta to the contrary, the same rule appears to have prevailed in equity. (*i*) This rule is, no doubt, attributable to the old notions on the subject of usury; but although the usury laws are abolished the rule remains, and the consequence is that interest is frequently not payable by law when in justice it ought to be

At the same time, by the custom of merchants interest has long been payable in cases where by the general law it was not; and mercantile usage and the course of trade dealings are held to authorize a demand for interest in cases where it would not otherwise be payable. (*k*) In applying therefore the general rule against the allowance of interest to partnership accounts, attention must be paid not only to any express agreement which may have been entered into on the subject, but also to the practice of each particular firm, and to the custom of the trade it carries on.

As a general rule partners are not entitled to interest on their respective capitals unless there is some agreement to that effect, or unless they have themselves been in the

(*f*) *Ex parte* Chippendale, 4 DeG. M. & G. 19, might perhaps have been properly decided on this ground alone.

(*g*) See *ante*, p. 550, and *Turquand v. Marshall*, 4 Ch. 376; *Lane's case* 1 De G. J. & Sm. 504. See, also, 22 Beav. 165.

(*h*) See *Calton v. Bragg*, 15 East, 223; *Higgins v. Sargent*, 2 B. & C. 349; *Shaw v.*

*Picton*, 4 ib. 723; *Page v. Newman*, 9 B. & C. 738; *Gwyn v. Godby*, 4 Taunt. 346.

(*i*) See *Tew v. The Earl of Winterton*, 1 Ves. J. 451; *Creuze v. Hunter*, 2 ib. 157; *Booth v. Leycester*, 1 Keen, 247, and 3 M. & Cr. 459.

(*k*) See *Ex parte* Chippendale, 4 DeG. M. & G. 36.

habit of charging such interest in their accounts(7); and even where one partner has brought in his stipulated capital and the other

(7) See *Cooke v. Benbow*, 3 DeG. J. & Sm. 1; *Miller v. Craig*, 6 Beav. 433, where interest was allowed, that having at one time been in accordance with the usage of those who carried on the business; and *Pim v. Harris*, Ir. Rep. 10 Eq. 442, where the decision was based on the terms of the contract.

<sup>1</sup>*Tutt v. Land*, 50 Geo. 350; *Desha v. Smith*, 20 Ala. 747; *Day v. Lockwood*, 24 Conn. 185; *Tirrell v. Jones*, 39 Cal. 655. See, also, *Whitcomb v. Converse*, 119 Mass. 38; *Moss v. McCall*, 75 Ill. 190; *Brown's Appeal*, 89 Penn. St. 139.

A partner cannot claim interest on his advances towards the capital stock, even though he took a note therefor, by its terms carrying interest. *Jones v. Jones*, 1 Ired. Eq. 332.

The law will not, in the absence of an express stipulation between the parties, compel one partner to pay interest to his co-partners on the amount by which their capital exceeds his. *Desha v. Smith*, *supra*.

A and B were partners. A furnished more capital than B, and under an agreement with B received interest on the excess. A's health failing, B claimed to withhold further payment of the interest, in view of the diminished value of A's services. It was referred, and settled in favor of A. B was still unsatisfied, but continued to use the excess of capital as before, and it did not appear that A's services were less valuable than B's: *Held*, that B was bound by the decision of the referee, and A entitled to the interest. *Piper v. Smith*, 1 Head, 93.

Where the articles provided that "if the wants and necessities of said business demand an increase of capital, and the same be supplied by the said A (a partner) the firm stipulate to pay him interest therefor at the rates," etc.:

*Held*, that the simple fact that said partner did not withdraw the whole of his share of the profits for the first year, without any agreement or notice to the co-partner that the capital was to be increased to that amount, did not give such partner a right of interest on such excess. *Tutt v. Land*, 50 Ga. 339.

Where a partnership agreement provided that the defendants should contribute a certain amount of money as a "working capital," and that such capital should draw interest at *seven* per cent., and during the continuance of the partnership business more capital was needed, and the defendants advanced it on the promise of their co-partner, that whatever money they put in they should get back with interest: *Held*, that on an accounting at the suit of their co-partner's assignee, they should be allowed interest on the additional money so advanced, as well as on the amount originally contributed. *Gilhooly v. Hart*, 8 Daly, 176.

Where the original articles of a co-partnership contain no such provision, it is not proper, in taking an account, to charge each partner with interest on his individual account, and to credit each one with interest on moneys paid in, unless a subsequent agreement to that effect is clearly and satisfactorily proved. But an agreement between partners that interest shall be computed on each one's account, and on the money paid in by him, will not justify computing interest on the individual accounts from the dates of the several charges up to the close of the business, independent of whether the amounts drawn out exceed the just share of the profits to the respective dates, due the several partners. Such an agreement, if proved, will be understood to mean that each partner will be charged with the in-

\*787 \*has not, the former will not be entitled to interest on the winding up of the partnership if it has not been previously charged and allowed in the accounts of the firm (*m*)<sup>1</sup>; and where a person is paid for his services by a share of profits, interest on capital cannot be charged against him, unless there is some agreement to that effect. (*n*)<sup>2</sup> Moreover, where interest on capital is payable, the interest stops at the date of dissolution (*o*), and undrawn profits are not necessarily to be treated as bearing interest like the capital. (*p*)

An advance by a partner to a firm is not treated as an increase of his capital, but rather as a loan on which interest ought to be paid; and by usage, interest is payable on money *bonâ fide* advanced by one partner for partnership purposes; at least when the advance is made with the knowledge of the other partners. (*q*)<sup>3</sup> Again, directors who advance money

interest on his individual account in excess of his share of the profits, and credited with interest on moneys advanced over and above his indebtedness to the firm. *Moss v. McCall*, 75 Ill. 190.

(*m*) *Hill v. King*, 3 DeG. J. & Sm. 418.

<sup>1</sup> Where partners agree to invest equal amounts of money in their common business, and one advances a larger sum than the other, he has been held entitled, upon settlement to an allowance of interest on one-half the excess so advanced by him from the date of its appropriation to the use of the firm. *Reynolds v. Mardis*, 17 Ala. 32.

Where a partnership is formed by three, two of whom are to furnish the capital, which they do furnish, the other to furnish no part thereof, in the absence of any agreement to that effect either express or to be implied from the conduct of the parties, those furnishing the capital will not have the right to charge the firm with interest paid by them in their own names with which to carry on the business of the firm. *Tapping v. Paddock*, 92 Ill. 92.

(*n*) *Rishton v. Grissell*, 5 Eq. 326,

where the capital was borrowed at interest.

<sup>2</sup> *Tirrell v. Jones*, 39 Cal. 655.

(*o*) *Barfield v. Loughborough*, 8 Ch. 1; *Watney v. Wells*, 2 Ch. 250; *Pilling v. Pilling*, 3 DeG. J. & Sm. 162, *contra*, on this point is practically overruled.

(*p*) *Dinham v. Bradford*, 5 Ch. 519. See, also, *Rishton v. Grissell*, 10 Eq. 393, as to interest on arrears of a share of profits.

(*q*) See *Ex parte Chippendale*, 4 DeG. M. & G. 36, and the cases in the next note. See, also, *Omychund v. Barker*, Coll. on Partn. 231, note; *Denton v. Rodie*, 3 Camp. 496. But see *contra*, *Stevens v. Cook*, 5 Jur. N. S. 1415.

<sup>3</sup> See *Morris v. Allen* 14 N. J. Eq. 44; *Hodges v. Parker*, 17 Vt. 242.

See, however, *Lee v. Lashbrooke*, 8 Dana, 214.

An ordinary partner, though entitled to interest on his advances, cannot claim conventional interest without his co-partner's written agreement to pay it; nor is such an agreement proved in an ordinary partnership by a charge of conventional interest in the books kept by the partner claiming it, and in the

for the purposes of their company under circumstances which entitle them to repayment, are also entitled to charge the company with interest on their advances. (*r*) The rate of interest given in such cases, is simply interest at 5 per cent. (*s*), unless a different rate is payable by the custom of the particular trade (*t*), or has been charged and allowed in the books of the particular partnership. (*u*)

Inasmuch as what is fair for one partner is so for another, \*and the firm when debtor is charged \*788 with interest, it seems to follow that if one partner is indebted to the firm either in respect of money borrowed, or in respect of balances in his hands, he ought to be charged with interest on the amount so owing,<sup>1</sup> even though on the balance of the whole account, a sum might be due to him. (*x*) Except, however, where there has been a fraudulent retention (*y*), or an improper application (*z*) of money of the firm, it is not the practice of the Court to charge a partner with interest on money of the firm in his hands (*a*); for example, under ordinary circumstances a part-

Interest on  
overdrawings  
and balances  
in hand.

accounts rendered from time to time to his co-partner. *Mourain v. Delamre*, 4 La. Ann. 78.

Articles of co-partnership between plaintiffs and defendants, in a bill in chancery, brought for the settlement of a co-partnership account, stipulated that the plaintiffs were to furnish the funds and credits necessary for conducting the partnership business and that "all accounts, paid by either party for necessary disbursements in the business of the company, were to be charged to the concern." A committee, to whom the cause was referred, found a balance of \$1,597.16 for interest, in favor of the plaintiffs on disbursements made in the year 1850. It appeared that in 1854 the defendant was informed of the result of such business; at all times had access to the accounts on the partnership book, in which he was interested, and sometimes inspected them, but made no objection to such charge, until the hearing of the cause in 1857: *Held*, that it was then too late for the defendant to object to such charge of interest, for the first time. *Pond v. Clark*, 24 Conn. 370.

(*r*) *Ex parte* Chippendale, 4 DeG. M. & G. 36; *Ex parte* Bignold, 22 Beav. 167; *Magdalena Steam Navigation Co. Johns*. 690; *Troup's case*, 29 Beav. 393.

(*s*) *Ex parte* Bignold, 22 Beav. 167; *Troup's case*, 29 ib. 353. See, also, *Hart v. Clarke*, 6 DeG. M. & G. 254.

(*t*) As to compound interest in the case of bankers, see *Bate v. Robins*, 32 Beav. 73; *Ferguson v. Fyfe*, 8 Cl. and Fin. 121.

(*u*) As in *Re Magdalena Steam Nav. Co. Johns*. 690, where 6 per cent. was allowed.

<sup>1</sup> See *Gridley v. Conner*, 2 La. Ann. 87.

(*x*) See *Beecher v. Guilburn*, *Moseley*, 3.

(*y*) As in *Hutcheson v. Smith*, 5 Ir. Eq. 117, where, however, the partner retaining the money was also a receiver appointed by the Court.

(*z*) As in *Evans v. Coventry*, 8 DeG. M. & G. 835.

(*a*) See *Webster v. Bray*, 7 Ha. 591, where interest on balances in the hands of the defendants was asked for but not given. See, too, *Stevens v. Cook*, 5 Jur. N. S. 1415; *Turner v. Burkinshaw*, 2 Ch. 488.

ner is not charged with interest on sums drawn out by him or advanced to him. (b)<sup>a</sup> In a case (c), A. and B. were partners; A. died, and his son and executor C. succeeded

Rhodes v.  
Rhodes

(b) *Cooke v. Benbow*, 3 DeG. J. & Sm. 1; *Meymott v. Meymott*, 31 Beav. 445. See the cases in the next note.

<sup>a</sup> In taking partnership accounts, the question whether interest shall be allowed or disallowed must depend on the circumstances of each particular case. *Gyger's appeal*, 62 Penn. St. 73; *Buckingham v. Ludlam*, 29 N. J. Eq. 345. Interest will be disallowed before dissolution, and allowed after dissolution, on overdrafts made by one partner, where there are special circumstances. *Buckingham v. Ludlam*, *supra*.

As a general rule, interest will not be allowed upon partnership accounts until after a balance is struck on settlement between the partners, unless the parties have otherwise agreed or acted in their partnership concerns. *Gilman v. Vaughan*, 44 Wis. 646; *Gage v. Parmelee*, 87 Ill. 330. See, also, *McCormick v. McCormick*, 1 Neb. 440; *Brown's appeal*, 89 Penn. St. 139.

Or unless it appears that the partner having such balances has made a profit by retaining them. *Colgin v. Cummins*, 1 Port. 148.

Or there has been great delay not satisfactorily accounted for. *Russell v. Green*, 10 Conn. 269.

Where a partner agrees in writing to exhibit a partnership account on a certain day and make a settlement, and on that day refuses and withholds the books, he is properly chargeable with interest from such day in any balance found against him on a bill for an account, up to the date of the first decree. *Scroggs v. Cunningham*, 81 Ill. 110.

While it is a general rule that one partner is not chargeable with interest on moneys of the firm in his hands,

until a balance has been struck or an accounting had, yet where one partner kept the account books and knew, or ought to have known, the precise amount in his hands belonging to the firm, and made at one time what purported to be a full statement of the business, which was incorrect: *Held*, that there was no error in charging him with interest. *Dimond v. Henderson*, 47 Wis. 172.

In general, where articles of co-partnership permit the partners to withdraw certain sums annually, without containing any stipulation in regard to interest thereon, interest will not be allowed. *Miller v. Lord*, 11 Pick. 11.

Where heirs were allowed to surcharge and falsify a partnership account between their intestate and the defendant, interest was refused on the errors in the accounts, which were owing to the mistakes of both parties, there having been no want of good faith, and no habit of charging interest between the parties. *Dexter v. Arnold*, 3 Mas. 284.

An entry as to interest on yearly balances in the books is presumed to have been made with the assent of all the partners, and binds each as if made by himself. *Pratt v. McHatton*, 11 La. Ann. 260.

On sums received by a partner during the course of business, he is not, in Louisiana, liable for interest under Civ. Code, 2829. He is liable only from a liquidation of the partnership, as a defaulter under Civ. Code 2984. *Hilligsberg v. Burthe*, 6 La. Ann. 170.

Where, on the dissolution of a partnership, a balance is found due from one partner to the other, and the former retains it, he is liable for interest

(c) *Rhodes v. Rhodes*, Johns. 653, but better reported in 6 Jur. N. S. 600.

him in partnership with B. B. afterwards retired in favor of his own son D. At the time of B.'s retirement, a considerable sum was due to him from A.'s estate in respect of moneys drawn out by A. This sum was treated as a debt of the new firm of C. and D., and had not been paid off. B. having died, his executors claimed interest from the time of his retirement; but the claim was disallowed on the ground that no agreement to pay interest had been entered into, and the claim was opposed to the course of dealing between the partners themselves.

Where one partner claims a benefit obtained by his co-partner and succeeds in establishing his claim, the claimant is charged, as the price of the relief afforded, not only with the amount actually expended by his co-partner

Interest where  
firm claims  
what has been  
obtained by  
one partner.

from the time of dissolution until payment. *Honore v. Colmesnil*, 7 Dana, 199; *Bowling v. Dobyns*, 5 id. 434; *Taylor v. Young*, 2 Bush, 428; *Holden v. Peace*, 4 Ired. Eq. 223.

A partner, who on the dissolution of the partnership holds the assets and property of the firm, and is entrusted with the duty of winding up the affairs of the partnership, is chargeable with interest, as between himself and his co-partner, if he mingles the money of the firm with his own or neglects unreasonably to settle his account. *Dunlap v. Watson*, 124 Mass. 305.

Where complainants, members of a partnership, had just grounds for filing a bill against their co-partner for a dissolution of the partnership, and a large balance was found due to them, the defendant should be decreed to pay interest from the time of filing the bill, and the costs; and where no objection to the amount allowed, the auditor was made in the court below, although such amount appears very extravagant, and no proof or data appears in the record, by which the court of appeals can correct it, the court will not undertake to fix the amount. *Moon v. Story*, 8 Dana, 226.

On a bill by one partner against another for an account after a dissolution, it appeared that the complainant never

advanced any capital, and that his whole interest consisted in his share of the profits of the concern: *Held*, that though the defendant continued the business after the dissolution as before, the share of the complainant not being paid to him, he should pay interest to the complainant on his share, and not a share of the profits which accrued subsequently to the dissolution. *Reybold v. Dodd*, 1 Harr. 401.

Partners resided in different places, and a large balance due to the partnership had accrued in the hands of one of them in 1827, but no account was rendered by either during the existence of the partnership, which dissolved in 1830. No settlement nor attempt to obtain a settlement was then had, and the debtor partner died in 1832, and no settlement was had until 1837: *Held*, that the parties had been both remiss in their duty, and that the estate of the debtor partner was not chargeable with interest on the balance due until the settlement in 1837, when, although the suit was pending, the amount due was ascertained, and might have been paid into court. *Bacham v. Eckford*, 2 Sandf. Ch. 116.

A surviving partner is liable for interest on a balance in his hands from the time when the business might have been settled up. *Hite v. Hite*, 1 B. Mon. 177.

in obtaining the benefit, but with interest on that amount at the rate of 5*l.* per cent. (*d*) On the other hand, if one partner 789\* has, in breach of \*the good faith due to his co-partners, obtained money which he is afterwards compelled to account for to the firm, he will be charged with interest upon the amount at the rate of 4*l.* per cent. (*e*)

In *Evans v. Coventry* (*f*), directors were charged with interest at 4*l.* per cent. on the money of the company improperly applied by them in paying themselves salaries, in paying dividends out of capital, and in buying up shares: and in other cases when they have been charged with assets of the company which they have misapplied, or with profits made by themselves, to which the company is entitled, they have usually been charged with interest at 4 per cent. (*g*)

Where a partnership has been dissolved by the death of one partner, and the surviving partner keeps the accounts in such a way as to render it impossible, until after the lapse of a considerable time, to ascertain the balances due to himself and his deceased partner, neither the surviving partner nor his representatives can claim interest on the sum ultimately found due to him or his estate. (*h*)<sup>1</sup>

(*d*) See *Hart v. Clarke*, 6 DeG. M. & G. 254; see, too, *Perens v. Johnson*, 3 Sm. & G. 419.

(*e*) See *Fawcett v. Whitehouse*, 1 R. & M. 132.

(*f*) 8 DeG. M. & G. 835.

(*g*) See *Joint Stock Discount Co. v. Brown*, 8 Eq. 407; *Parker v. McKenna* 10 Ch. 123.

(*h*) *Boddam v. Ryley*, 1 Bro. C. C. 239; 2 ib. 2; and 4 Bro. P. C. 561.

<sup>1</sup> Where one partner had charge of the firm books, and they were kept so that it was impossible to tell the true state of accounts: *Held*, that every presumption to his disadvantage was proper, and that he was properly chargeable with interest upon any money found due from him to the firm, though there had been no balance struck. *Dimond v. Henderson*, 2 N. W. Rep. N. S. 73.

## \*CHAPTER VII.

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## OF THE DIVISION OF PROFITS AND OF DIVIDENDS.

THE realization and division of profit is the ultimate object of every partnership; and the right of every partner to a share of the profits made by the firm to which he belongs, is too obvious to require comment. Where there is no right to share profits, there can be no partnership, and almost all the other rights possessed by partners may be said to be incidental to the right in question.

The times at which the profits are to be divided, the quantum to be divided at any one time, the sums, if any, which are to be placed to the debit of the firm in favor of any particular partner for salary, interest on capital, &c., before any profits are to be divided, these and all similar matters are usually made the subject of express agreement;<sup>1</sup> but where no such agreement has been made, and no tacit agreement relative to them can be inferred, the principles laid down in the preceding chapter must be applied. (a) With respect to the times of division and quantum

<sup>1</sup> Where the defendants in 1850 entered into a contract with a firm in Porto Rico, for the transacting of business between Porto Rico and New York, by the terms of which it was provided that each of the defendants should be entitled to one-third of the profits of such business, and in 1851, they entered into articles of co-partnership with the plaintiffs, by which it was provided "that the plaintiffs should be interested in said business, and that all shipments, made in pursuance of said contract, should be on joint account; that the plaintiffs should be one-third interested and that the defendants should repre-

sent the then two-thirds interest;" it was held that the share of the plaintiffs in the profits of the entire business transacted under said contracts, was not—as was claimed by the defendants—one-third of three-fourths, but one-third, thereof. *Pond v. Clark*, 24 Conn. 370.

G. guaranteed his partner, B. \$10,000 profits the first year "notwithstanding losses to any extent," and at the end of the year the partnership was dissolved and no profits made: *Held*, that B. was entitled to receive from G. the \$10,000. *Grant v. Bryant*, 101 Mass. 567.

(a) As to the mode of ascertaining profits where a person not a partner is

to be divided at any given time it is conceived that the majority must govern the minority where no agreement upon the subject has been come to (b); for these are matters of purely internal regulation, and with respect to such matters a dissentient minority have only one alternative, viz., either to give way to the majority, or, if in a position so to do, to dissolve the partnership.

\*791      \*Profit is the excess of receipts over expense; and in winding up a partnership or company, nothing is properly divisible as profit which does not answer this description.<sup>1</sup> But for the purposes of business, and of facilitating annual divisions of profits, a distinction is made between ordinary and extraordinary receipts and expenses; and whilst all extraordinary expenses are frequently defrayed out of capital, and out of money

entitled to a share of them, see *Rishton v. Grissell*, 5 Eq. 326, and 10 Eq. 393; *Geddes v. Wallace*, 2 Bli. 270.

(b) See *Stevens v. South Devon Rail. Co.* 9 Ha. 326, and *Corry v. London-derry, &c. Co.* 29 Beav. 263, as to declaring dividends before paying debts; *Browne v. Monmouthshire, &c. Co.* 13 Beav. 32, as to paying dividends before works are finished.

<sup>1</sup> Where parties purchase on joint account and for speculation a lot of goods, with the understanding that they shall share equally the profits and losses which may result from the sale thereof, the advances and expenses are to be first paid before there can be any division of the profits. It partakes of the nature of a partnership. *Doane v. Adams*, 15 La. Ann. 350.

Interest on the capital invested is not to be deducted in ascertaining the "net profits," but only losses and expenses of business. *Tutt v. Land*, 50 Ga. 339, 350. See *ante*, 786, note.

The plaintiffs sub-let part of their store to the defendant to carry on a certain business. Afterwards an agreement was entered into whereby the plaintiffs were to assist the defendant in his business, the latter to assume the whole rent, furnish the capital, defray

the expenses, and pay the plaintiffs one-fourth of the net profits: *Held*, that in ascertaining the profits, the defendant was entitled to a credit for loss of stock by fire (*Meserve v. Andrews*, 106 Mass. 419; *Gill v. Geyer*, 15 Ohio St. 399), but not for expenses incurred without the knowledge of the plaintiffs, in defending a criminal prosecution for carrying on the business, which did not arise through any act directly or indirectly of the plaintiffs. *Meserve v. Andrews, supra*.

A partner who has withdrawn assets and invested them in a new enterprise without his co-partners' consent, is chargeable only with their proportionate share of the profits thereof. *Brown v. Schackleford*, 53 Mo. 122.

Under articles of partnership which stipulated that the cash receipts, after deducting one-half the profits, are to be paid to one partner, and that the other partners are, at the expiration of the partnership, to take their proportion of the outstanding claims as part of the profits, the latter are not required to take the whole of their profits out of the claims. The last clause of the stipulation relates to such part of the profits as are represented by the claims. *Moore v. Thieher*, 31 Ark. 113.

raised by borrowing; the ordinary expenses are defrayed out of the returns of the business; and the profits divisible in any year are ascertained by comparing the ordinary receipts with the ordinary expenses of that year. It is obvious that, unless some such principle as this were had recourse to, there could be no division of profits, even of the most flourishing business, whilst any of its debts were unpaid, and any of its capital sunk. What losses and expenses ought to be treated as ordinary, and therefore payable out of current receipts, and what ought to be treated as extraordinary, and payable legitimately out of capital or money borrowed, is a question on which opinions may often honestly differ; and one which, when open to honest diversity of opinion, a majority of members can lawfully determine. The power of a majority, however, in such matters is limited by the principle that funds raised for one purpose cannot be applied to another without the consent of all the subscribers; and although in cases of honest doubt the power of a majority to decide how a particular expense or loss shall be borne can hardly be denied (*c*), such power cannot be lawfully exercised for the dishonest purpose of making it appear that profits have been made, when in truth the current receipts have been less than the current expenses. (*d*)<sup>2</sup> But if the current receipts exceed the current expenses, the writer apprehends that the difference can be divided as profit, although the capital may be spent and not be represented by saleable assets.

Under ordinary circumstances, and in the absence of any agreement to the contrary, moneys earned ought to be treated as profits of the year in which they are paid, and not as profits \*of the year in which they are earned (*e*); \*792 and in ascertaining the profits of a company for the purpose of making a dividend, debts incurred in the ordinary course of business ought to be deducted, but not debts incurred

Cases where dividends have been held not improper.

(*c*) See *Gregory v. Patchett*, 33 Beav. 595.

(*d*) See *Bloxam v. Metropolitan Rail. Co.* 3 Ch. 337.

<sup>2</sup> Partners in a commercial adventure made a statement of the supposed profits before the profits were ascertained, and before payment for the goods purchased for the adventure, and one of the partners, with his share of the prof-

its, purchased real estate. On a bill by a guarantor, who had paid the price of the goods, the court ordered a resale of the land purchased by the partner, to reimburse the guarantor. *Greene v. Ferrie*, 1 Dessau. 164.

(*e*) See *per Turner*, L. J., in *Maclaren v. Stainton*, 3 DeG. F. & J. 214. Compare *Browne v. Collins*, 12 Eq. 586.

by exercising special powers of borrowing. (*f*) Assets, moreover, may be estimated at a value which they may never realize. (*g*) It has also been held that dividends may be paid by a company before its works are finished (*h*), and although its debts may be unpaid. The creditors of a company may be willing to allow their principal moneys to continue unpaid, provided they are punctually paid the interest upon them; and if a company, after defraying all current expenses and the interest of its debts, has a surplus arising from its current receipts, there is no principle either of law or morality which requires that such surplus shall be accumulated, or forbids its division as profit amongst the shareholders. Whether dividends shall be paid whilst debts remain unpaid, or whether the whole or any part of the surplus of receipts over expenditure shall be accumulated or divided, are questions which it is competent for the majority of shareholders to decide. (*i*)

Expenses incidental to the formation of a company are frequently paid off by installments spread over a number of years, dividends being paid in the meanwhile (*k*); and if this is done openly, there seems to be nothing illegal in it. And it is conceived that dividends may be paid even by a limited company, if its income exceeds its expenditure, although its whole capital may have been sunk in starting the company, and could not be recovered if the company were wound up.

Expenses properly chargeable to capital, but paid out of income, may afterwards be charged to capital so as to increase a dividend. In other words, the income account may, in such a case be recouped by the capital account, and the two accounts be set right by paying a dividend out of capital. (*l*) But except in a case of this sort, payments out of capital cannot be profit; and to pay what are called profits or dividends out of capital is, under whatever disguise, tantamount to returning so much capital to the partners or shareholders, to whom such payments are made. In ordinary partnerships there is nothing to pre-

Payment of  
profit out of  
capital.

(*f*) *Corry v. Londonderry Co.* 29 Beav. 263.

(*g*) *Stringer's case*, 4 Ch. 475; *Rance's case*, 6 Ch. 104.

(*h*) *Browne v. Monmouthshire, &c.* Rail. Co. 13 Beav. 32.

(*i*) *Stevens v. South Devon Rail. Co.* 9 Ha. 313; *Corry v. Londonderry Co.*

29 Beav. 263.

(*k*) See *per* Martin, B. in *Bale v. Cleland*, 4 Fos. & Fin. 144. See, also, *Bardwell v. Sheffield Waterworks Co.* 14 Eq. 517.

(*l*) *Mills v. North Rail. of Buenos Ayers Co.* 5 Ch. 621. Compare *Hoole v. Great Western Rail. Co.* 3 Ch. 262.

vent the partners from withdrawing and diminishing their capitals wholly or in part if they all think proper to do so; nor is there any legal reason why partners should not, if they please, borrow money on the credit of the firm, and divide it wholly or in part among themselves. But neither course could be pursued without the consent of all the partners. With respect to companies, however, there are reasons why capital and money borrowed should not be applied in making payments to shareholders, even although they may all consent. In the first place, such an application of the money is calculated to deceive the public, and can hardly be made for any honest purpose; and in the next place, capital raised, or money borrowed, in order to carry on the business of the company, cannot be properly applied for such a wholly different purpose as that of paying dividends to the shareholders. (*m*) Even if all the shareholders can render such a course legal, a majority cannot; and the more difficult theoretical question whether all can is of little practical consequence. (*n*) With respect, indeed, to "companies governed by the Companies clauses consolidation act (*o*), or by the Table A. to the Companies act, 1862 (*p*), payment of dividends otherwise than out of profits is expressly prohibited, and will be restrained by injunction. (*q*)

Independently of any statute, if a company pledges its funds \*for the payment of debts, and \*794 Personal liability of directors. the directors misapply those funds by knowingly paying dividends out of capital, they are compellable to replace not only the amount of dividends, which they themselves have actually received in respect of their own shares, but also the whole amount of the dividends which they have caused to be paid to the other shareholders, and also interest thereon. (*r*) But neither directors nor shareholders are liable to refund dividends declared

(*m*) See *ante*, p. 600, *et seq.*

(*n*) See *Macdoughall v. Jersey Imperial Hotel Co.* 2 Hem. & M. 528; *Fawcett v. Laurie*, 1 Dr. & Sm. 192; *James v. Eve*, L. R. 6 H. L. 335.

(*o*) 8 & 9 Vict. c. 16, § 121.

(*p*) Table A., art. 73.

(*q*) See *ante*, note (*n*) and *Bloxam v. Metropolitan Rail. Co.* 3 Ch. 337; *Hoole v. Great Western Rail. Co.* ib. 262; *Holmes v. Newcastle, &c. Abattoir Co.*

1 Ch. D. 682. Compare *Bardwell v. Sheffield Waterworks Co.* 14 Eq. 517, as to payment of dividends before capital is productive.

(*r*) *Evans v. Coventry*, 8 DeG. M. & G. 835. See the decree, clause 4. The decree was made without prejudice to the right of the directors to recover the dividends back from those who had received them. Compare *Turquand v. Marshall*, 4 Ch. 376.

and paid on a *bond fide* valuation of assets although such assets may ultimately prove valueless. (s)

Moreover, directors who for fraudulent purposes and in order to induce shareholders and the public to believe that the affairs of a company are in a favorable position, have recourse to the scandalous expedient of declaring dividends out of profits when there are no profits wherewith to pay them, and pay the dividends declared, either out of the capital of the company or out of money borrowed for the purpose, are guilty of a criminal offense, punishable both at common law (t) and by statute (u), and are liable to an action for damages at the instance of persons induced to take shares on the faith of such misrepresentation. (x)

Where there is no agreement, express or tacit, to the contrary, the profits realized by an ordinary partnership are divisible amongst its members in equal shares, although their capitals may be unequal. (y)<sup>1</sup>

A resolution on the part of a majority of partners, or on the part of the directors or shareholders of a company, to exclude a partner or shareholder from his share of the profits, can only be defended where the right to make such a resolution has been clearly conferred by the agreement of all the partners; or, in the case of a company, by the act, charter, or deed of settlement by which it is governed. A resolution to exclude a partner or shareholder from his share of profits is very like a resolution to forfeit his share, and is illegal unless specially authorized. (z)<sup>1</sup>

(s) See *Stringer's case*, 4 Ch. 475; *Rance's case*, 6 ib. 104.

(t) See *per* Lord Campbell, in *Burnes v. Pennell*, 2 H. L. C. 497; *R. v. Esdaile*, 1 Fos. & Fin. 213.

(u) See *infra*, p. 814, on fraudulent accounts.

(x) *Bale v. Cleland*, 4 Fos. & Fin. 117, and other cases, *ante*, p. 324.

(y) See *ante*, p. 676.

<sup>1</sup>Three persons became partners. The capital stock agreed upon was nine thousand dollars. The partners were each to pay three thousand dollars. Two of the partners paid in substantially their shares of capital stock. The other paid one-half of his stock, and

agreed to pay the residue at the end of twelve months. The partners purchased real estate, machinery and materials, and engaged in business. The partnership debts and liabilities were paid out of the personal property belonging to the firm. The real estate was left unincumbered of partnership debts. The partners sold the real estate belonging to the firm: *Held*, that the partner who had paid only one-half of his stock was not entitled to share equally with his co-partners in the partnership assets. *Smith v. Hazleton*, 34 Ind. 481.

(z) See *ante*, p. 745; and *Griffith v. Paget*, 5 Ch. D. 894.

<sup>1</sup>Several persons engaged in a part-

A court will protect a partner or shareholder whose share of profits is wrongfully withheld, and compel his co-partners or co-shareholders to account to him for such share. (a)

In *Adley v. The Whitstable Company* (b), an incorporated company of oyster fishers and dredgers made a by-law to the effect, that if any member should sell oysters, except those taken from the company's grounds, he should forfeit 10*l.*, and be excluded from all share in the profits which the company might make after the penalty was incurred and before it was paid. A member infringed the by-law and refused to pay the penalty, and was thereupon excluded from all share of the profits of the company. But on a bill filed by him against the company, it was held that the by-law was invalid (c); that the company had no right to exclude any of its members from their share of profits on any such ground as that in question; and that it was no defense that the profits of which the plaintiff sought a share were actually gone, having been divided amongst the other members. An objection that the parties, if any, accountable to the plaintiff, were the officers of the company, who paid those profits, and not the company itself, was also overruled, and a decree was made in the plaintiff's favor.

*Primâ facie* all the shareholders in a company are entitled to share profits *pari passu* in proportion to the number of shares they respectively hold; and a resolution by a majority that dividends shall be paid to some of the shareholders in preference to, or to the exclusion of the others, is clearly illegal unless it is warranted by something more than the will of those who make it. (d)

nership for the purpose of buying lands from Indians, and reselling them, the parties to be interested in the profits in the proportion that they each invested their money in the purchase of land: *Held*, that funds arising from the resale of land in the hands of any of the partners, being the profits of the land resold, was the money of the company, open to re-investment; and whilst such a fund existed, adequate to the demand, no partner could be considered in default if his proportion of it was sufficient to meet the exigency. Nor could a mem-

ber of the firm, actively engaged in its business, be excluded from a participation in its benefits for want of funds, without notice. *Patterson v. Ware*, 10 Ala. 444.

(a) See *post*, c. 10, § 3, under the head Account.

(b) 17 Ves. 315; 19 ib. 304, and 1 Mer. 107.

(c) An action was directed to be brought to try this question.

(d) See *Adley v. Whitstable Co.* 17 Ves. 315, and the cases in note (g).

Maughan v.  
Leamington  
Gas Company.

Cases, however, of an exceptional character may arise, as is \*shown by the following instance : In *Maughan v. Leamington Gas Company (e)*, certain shareholders in a gas company were entitled to dividends up to 10 per cent., and certain other shareholders were only entitled to dividends up to 7 per cent. The surplus profits, if any, were to be applied first, in making up the dividends of past years to these amounts, and secondly, in reducing the charges for gas. The profits not being sufficient to pay a dividend of 10 per cent. on the one set of shares, and also a dividend of 7 per cent. on the other set, it was resolved to pay a dividend of 8 per cent. on the first, and 7 per cent. on the second. It was contended that this resolution was illegal, and that the dividend ought to be declared in the proportion of 10 to 7; and a suit was instituted to enforce this view. But the Court declined to interfere; considering that, according to the true construction of the statutes relating to the company, the above proportions might be departed from when the profits were insufficient to pay both classes of shareholders their maximum amounts of dividend.

It is by no means unusual for companies who have expended their original capital, to raise (under some power specially conferred upon them for the purpose) further capital by the issue of "preference shares," *i.e.*, of shares the holders of which are to be entitled to share profits, up to a given amount, in preference to the other shareholders. The right to do this has been already examined. (*f*)

Where preference shares have been issued by competent authority, the terms upon which they have been issued must, of course, be adhered to; and it has been decided in several cases that, unless there is some agreement or enactment to the contrary, preference shareholders are entitled to be paid out of the profits of the company their dividends to the amount guaranteed, before the other shareholders receive anything: so that if the profits divisible at a given time are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good out of the next divisible profits; the ordinary shareholders taking no profits until all arrears of \*797 guaranteed dividends have been paid to the preference \*shareholders. (*g*) This rule, however, has been altered by statute,

(*e*) 15 W. R. 333.

(*f*) *Ante*, p. 621.

(*g*) See *Webb v. Earle*, 20 Eq. 556, and other cases cited *ante*, p. 618. In

so far as concerns companies governed by the Companies clauses consolidation act. (*h*)

No resolution of a company can possibly vary the rights of the holders of different classes of duly created shares. No resolution can deprive preference shareholders of their right to be paid the sums guaranteed out of the company's profits as soon as there are any. So long as there are no profits, the preference shareholders get nothing, for they are not creditors of the company (*i*); but as soon as there are any profits to divide, they must be applied in payment of whatever is required to make up to the preference shareholders the sums guaranteed to them, including all arrears, if that is the bargain with them. (*j*) Where funds were guaranteed to a company in order to enable it to pay dividends, and the company was ordered to be wound up, those funds were held to be general assets, and not to belong to the shareholders individually. (*k*)

Rights of preference shareholders.

Where there are several classes of shares on which unequal sums have been paid up, the profits of the company ought *prima facie* to be divided amongst the shareholders in proportion to the sums paid up on their respective shares, and not in proportion to the nominal values of such shares. (*l*)

Payment of dividends on shares of unequal amount.

With respect to the payment of dividends, it may be useful to observe that—

1. Dividends must be paid in money; not in shares unless all the shareholders so agree. (*m*)

2. Where shares are charged by a judge's order under 1 & 2 Vict. c. 110, the dividends must nevertheless be paid to the judgment debtor, for he is the person entitled to them at law (*n*), and his receipt discharges the company even in equity. (*o*) The payment of

\*798 Effect of charging order.

Bangor v. Port Madoc Slate Co. 20 Eq. 59, the preference was held to extend to capital also.

(*h*) 26 & 27 Vict. c. 118, § 14, noticed *ante*, p. 617.

(*i*) Preference shareholders are not entitled on a winding up to any preference in the division of assets if there are no profits; London India Rubber Co. 5 Eq. 519.

(*j*) See notes (*g*) and (*i*); *ante*, p. 618, note.

(*k*) *Re Stuart's Trusts*, 4 Ch. D. 213.

(*l*) See *Somes v. Currie*, 1 K. & J. 605; *Ex parte Maude*, 6 Ch. 51; see 8 & 9 Vict. c. 16, § 120; 25 & 26 Vict. c. 89, Table A. No. 72.

(*m*) See *Hoole v. Great Western Rail. Co.* 3 Ch. 262.

(*n*) See *Fowler v. Churchill*, 11 M. & W. 57; *Churchill v. Bank of England*, *ib.* 323.

(*o*) See *Bristed v. Wilkins*, 3 Ha. 235.

dividends to a particular shareholder may, however, be restrained under 5 Vict. c. 5, § 4. (*p*)

3. Where a deed of transfer has been forged, and the company has registered it believing it to be genuine, the company must nevertheless pay the dividends to the true owner, and is not entitled to make him and the transferee interplead. (*q*)

4. Where shares are registered in the name of a married woman, the dividends ought to be paid to her and her husband, or to him; but not to her without him, unless the shares belong to her for her separate use. (*r*)

Having made these general observations on the payment of dividends, it is proposed to notice shortly the legislative enactments bearing upon the same subject.

No shareholder in a company governed by the Letters Patent act is entitled to any share of the profits of the company unless he is registered as a shareholder. (*s*)

The Companies clauses consolidation act declares that a company governed by it shall not be bound to see to the execution of any trust, and that the receipt of the person, or of any one of the persons in whose name a share may be registered, shall be a discharge to the company for all moneys paid in respect of such share, notwithstanding any trusts to which it may be subject. (*t*) Interest upon all mortgage and bond debts must be paid in preference to any dividends (*u*), which are to be declared only at general meetings of the shareholders. (*x*) It is the business of the directors, previously to every meeting at which it is proposed to declare a dividend, to prepare a scheme show-

\*799 ing the profits which have accrued \*since the last meeting at which a dividend was declared, and apportioning such profit, or so much of it as they may consider applicable to the purposes of dividend, among the shareholders. (*y*) No dividend is to

(*p*) See *ante*, p. 697.

(*q*) *Dalton v. Midland Rail. Co.* 12 C. B. 458, and 13 ib. 474. See, as to the remedy of the true owner in equity, *Cottam v. Eastern Counties Rail. Co.* 1 J. & H. 243; *Johnston v. Renton*, 9 Eq. 181.

(*r*) See *Dalton v. Midland Rail. Co.* 13 C. B. 474, where a married woman sued alone for dividends and recovered,

the non-joinder of her husband not having been pleaded in abatement.

(*s*) 7 Wm. 4 & 1 Vict. c. 73, § 20.

(*t*) 8 & 9 Vict. c. 16, § 20.

(*u*) *Ib.* § 48.

(*x*) *Ib.* § 91.

(*y*) *Ib.* § 120. As to withholding dividends from preference shareholders, see *ante*, p. 797, notes (*g*) and (*h*).

be paid out of capital. (z) The directors are authorized to set apart out of the profits such sum as they may think proper to meet contingencies, or for repairs and improvements. (a) No shareholder is entitled to be paid any dividends unless he is registered, and has paid all calls due from him to the company. (b)

The Companies act, 1862, is silent upon the subject of dividends.

By Table A., however, it is provided that the directors may, with the sanction of the members, declare a dividend to be paid to them in proportion to their shares (No. 72). But no dividend is payable except out of profits (No. 73); and, before recommending any dividend, the directors may set aside out of the profits such a sum as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company (No. 74). Moneys due from any member, for calls or otherwise, may be deducted from the dividends payable to him (Table A., No. 75). Dividends unclaimed for three years may be forfeited for the benefit of the company (No. 76). No dividend bears interest (No. 77). If several persons are registered as joint holders of any share, the receipt of any one of them for the dividends payable in respect of such share is to be effectual (No. 1).

Companies  
act, 1862.  
Table A.

(z) Ib. § 121.

(b) Ib. §§ 8 and 123.

(a) Ib. § 122.

## \*CHAPTER VIII.

## ON THE ACCOUNTS OF PARTNERSHIPS AND COMPANIES.

In the present Chapter it is proposed to consider, (1), the mode in which partnership accounts are kept; (2), the duty of keeping and the right of inspecting the accounts of partnerships and companies; and (3), the consequences of publishing false and fraudulent accounts. The subject of opening accounts will be referred to in a subsequent chapter.

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## SECTION I.—OF THE MODE OF KEEPING PARTNERSHIP ACCOUNTS.

It is usual among mercantile men to treat all the accounts of a partnership as accounts of the firm, and to deal with the accounts of individual partners as if they were simply debtors or creditors of the firm. The property brought into the concern is credited to the stock account of the firm, and is then distributed through the ledger accounts; and in these ledger accounts the several articles and persons are made debtors to stock for the several items passed into those accounts. Each partner has his own separate account opened with the firm (usually in a private ledger), and is credited with everything he brings into it, and is debited with everything he draws out of it. Upon a rest, the net profits are determined, and are divided between the partners in the proper proportions, and the share of each partner is carried to the credit of his own separate account. The partners are creditors of the firm for all its stock, and they are debtors to it for all its deficiencies. When they first bring in their capital, the firm is in the private ledger made debtor to each of them for his proportion of capital. Whenever stock is taken, and a surplus appears, that surplus is divided according to the shares, and is carried to the

\*accounts of the respective partners. If, instead of a sur- \*801  
plus, a deficiency appears, the loss is apportioned in the same  
way. (a)

Each partner being thus treated like an ordinary creditor and  
debtor, in respect of what he brings in and what he draws out; the  
balance standing to his credit or to his debit, as the case may be,  
in the private ledger, shows how his account with the *firm* stands.  
Upon payment of that balance by the firm to him, if the balance  
is in his favor, or by him to the firm, if the balance is against him,  
his account with the firm is closed and settled.

Each partner's share of a profit to be divided, or of a loss to be  
made good, is ascertained by a simple rule of three  
calculation. If the partners have agreed to share profits  
and losses equally, the share of each, of any particular  
profit or any particular loss, is ascertained by dividing the whole  
profit or whole loss, as the case may be, by the number of partners.  
If, however, the partners share profits and losses in proportion to  
their respective capitals, then as the united capitals are to the  
whole profit or whole loss, so will each partner's share of capital  
be to his share of such profit or loss.

Mode of ascer-  
taining part-  
ner's share of  
profit or loss.

In order to illustrate the principle upon which partnership ac-  
counts are kept let it be supposed that A., B., and C.  
are partners, with a capital of 3000*l.* subscribed by  
them equally; that they share profits and losses in proportion to  
their respective capitals, and that A. has drawn out 500*l.* and B.  
has advanced 100*l.* There are, then, three cases to be considered.

Examples.

*Case 1.—Where there are no profits or losses.*

The accounts will then stand thus (b):—

1. Partnership Account.			
Dr. to stock.	.	.	3000 0 0
to B. for advance	.	.	100 0 0
			£3100 0 0
Cr. by A.'s sum withdrawn			500 0 0
by balance			2600 0 0
			£3100 0 0

(a) See Cory on Accounts, ed. 2, p. 71 interest. In cases 2 and 3 interest is  
*et seq.* supposed to be calculated.

(b) In this case no notice is taken of

Examples. \*802

\*2. A.'s Account.

<i>Dr.</i> to sum withdrawn . . .	500 0 0	<i>Cr.</i> by capital . . .	1000 0 0
to balance . . .	500 0 0		
	<hr/>		<hr/>
	£1000 0 0		£1000 0 0
	<hr/>		<hr/>

3. B.'s Account.

<i>Dr.</i>		<i>Cr.</i> by capital . . .	1000 0 0
to balance . . .	1100 0 0	by advance . . .	100 0 0
	<hr/>		<hr/>
	£1100 0 0		£1100 0 0
	<hr/>		<hr/>

4. C.'s Account.

<i>Dr.</i>		<i>Cr.</i> by capital . . .	1000 0 0
to balance . . .	1000 0 0		
	<hr/>		<hr/>
	£1000 0 0		£1000 0 0
	<hr/>		<hr/>

5. Balance Sheet.

<i>Dr.</i> to balance as above (from 1) . . .	2600 0 0	<i>Cr.</i> by balance due as above to A. . .	500 0 0
		“ B. . .	1100 0 0
		“ C. . .	1000 0 0
	<hr/>		<hr/>
	£2600 0 0		£2600 0 0
	<hr/>		<hr/>

*Case 2.—Where there is a profit to be divided.*

The accounts will then stand as under, if the profit is supposed to be 1000*L.*, and interest at 5 per cent. is charged on all sums brought in and taken out by each partner, and on his capital.

1. Partnership Account.

<i>Dr.</i> to stock . . .	3000 0 0	<i>Cr.</i> by A.'s sum withdrawn with interest for one year . . .	525 0 0
to interest on ditto for one year . . .	150 0 0		
to B. for advance with in- terest for one year . .	105 0 0		
to profit . . .	1000 0 0	by balance . . .	3730 0 0
	<hr/>		<hr/>
	£4255 0 0		£4255 0 0
	<hr/>		<hr/>

\*2. *A's Account.*

\*803 Examples.

<i>Dr.</i> to sum withdrawn with		<i>Cr.</i> by capital. . . . .	1000 0 0
interest for one year . . .	525 0 0	by interest on ditto. . . .	50 0 0
to balance. . . . .	858 6 8	by $\frac{1}{3}$ share of profit. . . .	333 6 8
	<u>£1383 6 8</u>		<u>£1383 6 8</u>

3. *B's Account.*

<i>Dr.</i>		<i>Cr.</i> by capital. . . . .	1000 0 0
		by interest on ditto. . . .	50 0 0
		by advance and interest	
balance. . . . .	1488 6 8	thereon. . . . .	105 0 0
		by $\frac{1}{3}$ share of profits. . . .	333 6 8
	<u>£1488 6 8</u>		<u>£1488 6 8</u>

4. *C's Account.*

<i>Dr.</i>		<i>Cr.</i> by capital. . . . .	1000 0 0
		by interest on ditto. . . .	50 0 0
to balance. . . . .	1383 6 8	by $\frac{1}{3}$ share of profits. . . .	333 6 8
	<u>£1383 6 8</u>		<u>£1383 6 8</u>

5. *Balance Sheet.*

<i>Dr.</i> to balance as above		<i>Cr.</i> by balance due as above	
(from 1). . . . .	3730 0 0	to A. . . . .	858 6 8
		" B. . . . .	1488 6 8
		" C. . . . .	1383 6 8
	<u>£3730 0 0</u>		<u>£3730 0 0</u>

*Case 3.—Where there is a loss to be made good.*

Then if the loss is supposed to be 5000*l.*, and interest is calculated as in the last example, the accounts will stand thus:—

1. *Partnership Account.*

<i>Dr.</i> to stock. . . . .	3000 0 0	<i>Cr.</i> by loss . . . . .	5000 0 0
to interest on ditto for		by A.'s sum withdrawn	
one year. . . . .	150 0 0	with interest for one year	525 0 0
to B. for advance with in-			
terest for one year. . . .	105 0 0		
to balance. . . . .	2270 0 0		
	<u>£5525 0 0</u>		<u>£5525 0 0</u>

Examples, \*804

\*2. *A.'s Account.*

<i>Dr.</i> to sum withdrawn with		<i>Cr.</i> by capital . . .	1000 0 0
interest for one year . . .	525 0 0	by interest on ditto . . .	50 0 0
to $\frac{1}{3}$ share of loss . . .	1666 13 4	by balance . . .	1141 13 4
	<hr/>		<hr/>
	£2191 13 4		£2191 13 4

3. *B.'s Account.*

<i>Dr.</i> to $\frac{1}{3}$ share of loss . . .	1666 13 4	<i>Cr.</i> by capital . . .	1000 0 0
		by interest on ditto . . .	50 0 0
		by advance with interest . . .	105 0 0
		by balance . . .	511 13 4
	<hr/>		<hr/>
	£1666 13 4		£1666 13 4

4. *C.'s Account.*

<i>Dr.</i> to $\frac{1}{3}$ share of loss . . .	1666 13 4	<i>Cr.</i> by capital . . .	1000 0 0
		by interest on ditto . . .	50 0 0
		by balance . . .	616 13 4
	<hr/>		<hr/>
	£1666 13 4		£1666 13 4

5. *Balance Sheet.*

<i>Dr.</i> to balance due as above		<i>Cr.</i> by balance as above	
from A. . . .	1141 13 4	(from 1) . . .	2270 0 0
“ B. . . .	511 13 4		
“ C. . . .	616 13 4		
	<hr/>		<hr/>
	£2270 0 0		£2270 0 0

The balances ultimately arrived at in the foregoing accounts are the sums payable—in the first two cases by the firm to the individual partners, and in the last case to the firm by them—in order to wind up the affairs of the firm. But it must not be imagined that the balances in question are debts owing to each partner by his co-partners. The balances are owing by and to the *firm*, and each partner being included in the firm is, to the extent of his share, his own debtor and his own creditor.

Accountants are quite right in debiting each partner in his account with the firm with the whole of whatever he draws out, and in crediting him with the whole of whatever he brings in.<sup>1</sup> \**“But,”* as observed

<sup>1</sup>Advances to the firm by one of its members do not constitute debts of the firm, but merely matters of account be-

tween the partners to be settled in the final adjustment of the partnership. *Wilson v. Soper*, 13 B. Mon. 411.

by Lord Cottenham, "though these terms 'debtor' and 'creditor' are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of Partnership, than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of obtaining payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity—assuming always that no separate security has been taken or given. (c) The supposed creditor's debt is due from the firm of which he is a partner; and the supposed debtor owes the money to himself in common with his partners." (d)

The final adjustment of a partnership account frequently gives rise to questions of some difficulty. One is, whether the principles on which profits and losses have been previously ascertained are to be adhered to, or whether they are to be more or less departed from; another is, whether on a final adjustment of accounts anything can be regarded as profit or loss until the capitals of the partners have been repaid or exhausted as the case may be. In order to solve these and similar questions regard must always be had to the terms of the partnership articles; but an express agreement with \*reference to the taking of accounts may be, and frequently is, only applicable

(c) The remedies available by one partner against another will be examined hereafter. See, also, *ante*, p. 206.

(d) *Richardson v. The Bank of England*, 4 M. & Cr. 171-2. Suppose that a firm consists of three partners, A B and C; that their respective capitals are  $a, b, c$ , and that they share profits and losses in proportion to those capitals. Then  $a+b+c$  will be the joint capital of the three partners; and if  $M$  represents the amount of loss or gain to be shared, A's share of such loss or

gain will be  $\frac{M}{a+b+c} \times a$ ; B's share

will be  $\frac{M}{a+b+c} \times b$ ; and C's

share will be  $\frac{M}{a+b+c} \times c$ . Upon

precisely the same principle, if the firm is indebted to A in a sum  $a'$ , A will owe himself in respect of this

debt  $\frac{a'}{a+b+c} \times a$ ; B will owe A

$\frac{a'}{a+b+c} \times b$ ; and C will owe

A  $\frac{a'}{a+b+c} \times c$ . So if B is in-

debted to the firm in a sum  $b'$ ; B will owe himself in respect of this

debt  $\frac{b'}{a+b+c} \times b$ ; he will owe

A  $\frac{b'}{a+b+c} \times a$ ; and will owe C

$\frac{b'}{a+b+c} \times c$ .

to the case of a continuing partnership, and may not be intended to be observed on a final dissolution of the firm, or even on the retirement of one of its members. (e) A similar observation applies to the mode in which the partners themselves have been in the habit of keeping their accounts: that which has been done for the purpose of sharing annual profits or losses is by no means necessarily a precedent to be followed when a partnership account has to be finally closed. Bearing these observations in mind, the following rules are submitted as those which ought to be followed upon a final settlement of partnership accounts, where there is nothing else to serve as a guide.

In adjusting the accounts of partners, losses ought to be paid, first out of profits, next out of capital, and lastly by having recourse to the partners individually (f)'; and the assets of the partnership should be applied as follows:

Rules to be  
observed.

(e) See, for examples, *London India Rubber Co.* 5 Eq. 519; *Blisset v. Daniel*, 10 Ha. 493; *Wade v. Jenkins*, 2 Giff. 509; *Wood v. Scoles*, 1 Ch. 369; and as to interest, *ante*, p. 787, note (o); compare *Re Barber*, 5 Ch. 687.

(f) See *Crawshay v. Collins*, 2 Russ. 347, and *Richardson v. Bank of England*, 4 M. & Cr. 173.

<sup>1</sup>By a partnership agreement, A was to furnish \$20,000 and B was to manage the business, keep the stock up to the original value, and, on dissolution to deliver up to A the remaining stock, to the value of \$20,000, "losses by bad debts, decay of goods, and inevitable accidents, excepted." The partnership was to continue five years, unless dissolved by B's death. The profits, after paying rent, taxes, and necessary expenses, were to be equally shared: *Held*, that the losses by bad debts, &c., were to be deducted from the profits, and not from the stock of \$20,000, so long as there was a surplus over that amount. *Leach v. Leach*, 18 Pick. 68.

Defendants owned and published a "Shipping Register." They agreed with certain insurance inspectors to share equally with such inspectors 50

per cent. of the profits of the "Register" in consideration of which the inspectors were to furnish information for the "Register." Upon the execution of this agreement plaintiff and defendants formed an association styled the "American Lloyds." An account having been had, plaintiff sued for his share of the 50 per cent. profits. Defendants pleaded non-performance by plaintiff, on a full payment by defendant on a counterclaim for damages caused by plaintiff's alleged confederacy with the owners of a rival publication. Upon the trial, among the facts adduced, the defendants showed that by reason of alleged unskillfulness or negligence a claim was made against the association which might exhaust the entire amount of its assets: *Held*, that it is undoubtedly the rule that the property of a partnership shall be first applied to the payment of the debts of the concern before there can be any division of the assets. This rule applies even though there is a person to be compensated for services out of the profits. But the defendants cannot insist upon the application of this rule to the present case, because: 1. The claim is not admitted

1. In paying the debts and liabilities of the firm to non-partners;

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;

3. In paying to each partner rateably what is due from the firm to him in respect of capital;

4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown.

If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contributions *inter se*. If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss, to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, \*807 but payable to one of the partners instead of to a stranger. (g) If after paying all the debts and liabilities of the firm and the advances of the partners, there is still a surplus, but not sufficient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses to be met like other losses. (h)<sup>1</sup>

by the defendants to be a valid claim, but they deny liability therefor. 2. The defendants have rendered their account without noticing such claim, and they had previously acted on accounts so rendered as fixing the amount of compensation. 3. No such defense is set up in the answer, and it is not therefore available in the present action. *Luce v. Hartshorn*, 7 Lans. 331.

An agreement was made between C. and Y., co-partners, that the partnership existing between them should be dissolved; that C. should take all the real estate and personal property of the firm at a certain value, nothing being said about the taxes then existing against the property; that C. should pay the indebtedness of the firm included in a certain list; and that the liability of

the firm not included in the list should be paid out of money collected from the outstanding debts due the firm: *Held*, that the taxes should be paid out of the co-partnership funds. *Young v. Clute*, 12 Nev. 31.

(g) See *Wood v. Scoles*, 1 Ch. 369.

(h) See the next two notes.

<sup>1</sup>Two persons (H. & C.), both of whom then resided in the State of New York, entered into written articles of co-partnership, by which they agreed to transact as partners at Keokuk, Iowa, the wholesale and retail dry-goods business. H. & C. severally agreed to contribute and did contribute \$2,000 of capital each, in cash. H. agreed to devote himself diligently at Keokuk to the said partnership business, except when the purchasing of goods or other necessary

The only case which practically gives rise to difficulty, is when partners have advanced, or agreed to advance, unequal capitals and to share profits and losses equally. If nothing more than this is agreed, a deficiency of capital must be treated like any other loss; and the assets remaining after payment of all debts and advances must be distributed amongst the partners so as to make each partner's loss of capital equal; and if the assets are not sufficient, there must be such a contribution amongst the partners, or some of them, as to put all on an equality. (i)<sup>2</sup> But,

Equality of loss and inequality of capital. business of the firm required him to be absent from Keokuk. C. agreed to attend to that part of the business which could be conducted in the city of New York, as far as he was able, without interfering in any way with his duties there as clerk of any firm by whom he might be employed. It was stipulated that H. should be entitled to receive and be paid " $\frac{3}{4}$  parts of the profits of said partnership," and the said C. " $\frac{1}{4}$  part." The agreement did not in terms make any provision in respect to losses. No profits were made, but the losses absorbed \$3,120.20 of the capital contributed: *Held*, that neither party had any claim against the other for the money lost, and that the \$879.80 remaining of the capital should be equally divided between the partners: *Held*, also, that by a just construction of the articles, it was agreed thereby that H. should receive  $\frac{1}{2}$  profits for his extra services if profits were made; and if none were made, he was not to be compensated therefor, and that losses were to be equally borne. *Hasbrouck v. Childs*, 3 Bosw. 105.

It was expressly agreed that C. and W., two out of four partners were to receive interest on the capital by them respectively contributed. The firm was dissolved by mutual consent, and W. closed up the firm's business, which resulted in a loss: *Held*, on bill in equity by W. against the other partners that the capital constituted a debt of the

partnership to pay which all the partners were bound to contribute equally, and that, one of them being insolvent the others were bound to contribute equally to make up the loss. *Whitcomb v. Converse*, 119 Mass. 38.

When, under a partnership contract the proceeds of the enterprise constitute the primary fund from which a partner is to be reimbursed for excess in advances, and the partnership is, by consent, terminated before they are sufficient, the partner who has advanced in excess of the amount due from him may maintain his action for the excess. *Merriwether v. Hardeman*, 51 Tex. 436.

(i) *Nowell v. Nowell*, 7 Eq. 538; *Anglesea Colliery Co.* 2 Eq. 379, and 1 Ch. 555; *Ex parte Maude*, 6 Ch. 51. Compare *Holyford Mining Co.* Ir. Rep. 3 Eq. 208.

<sup>2</sup> See *Taylor v. Coffing*, 18 Ill. 422; *Malley v. Brine*, 120 Mass. 324.

Where, by articles of co-partnership, A contributes money, and B his personal services, in the event that there are no profits, and the capital furnished by A is lost: *Held*, that B. cannot, in the absence of any agreement to the contrary, be called upon to bear any proportion of the loss of the capital. *Cameron v. Watson*, 10 Rich. Eq. 64. *Early v. Durborow*, 1 Pa. Leg. Gaz. Rep. 127.

• C., one of four partners, was to contribute to the business \$25,000, and "such time as he may be able to give,"

if the true meaning of the partners is that all debts shall be paid out of the assets, and that any surplus assets remaining after payment of debts shall be divided between the partners in proportion to their interests therein or to their capitals, effect must be given to such an agreement, and those partners who agree to bring in most capital will lose most. (*k*)

## SECTION II.—OF THE DUTY TO KEEP AND THE RIGHT TO INSPECT PARTNERSHIP ACCOUNTS.

### 1. *In ordinary partnerships.*

It is one of the clearest rights of every partner to have accurate accounts kept of all money transactions relating to the business of the partnership, and to have free access to all its books and accounts. (*l*)<sup>3</sup> So important is it to every \*partnership that proper accounts shall be kept and be ac- \*808 cessible to all the partners, that whenever any written articles of partnership are entered into, clauses are inserted for the

Duty to keep  
proper ac-  
counts

receiving interest on the \$25,000; W., another partner, \$50,000, and all his time, receiving interest on the \$50,000, and B. and A., the two others, to contribute of their time. Each partner was to receive one-fourth of the net profits. The business resulted in a loss, and B. became insolvent: *Held*, that the capital constituted a debt of the partnership to which all were bound to contribute equally, and that the loss was to be borne equally by C. W. and A. *Whitcomb v. Converse*, 119 Mass. 38.

Articles of co-partnership between S. T. and two others, stipulated that the latter should furnish \$6,000, *i. e.*, each \$3,000, the profits and losses to be divided equally among the three co-partners, share and share alike: *Held*, 1, that as the consideration of S. T.'s being entitled to  $\frac{1}{3}$  of the profits did not appear, it was a matter of fact for the jury to determine, on oral evidence, of what it consisted, whether it was mere-

ly that he was to contribute one-third of the labor, or was to furnish skill, credit, attention and services in carrying on the business.

2. If the two, under such agreement, besides capital, were to furnish their skill and services, the question whether if a loss of capital occurred in the business, S. T. is not bound to pay one-third of the deficiency, is also a matter of fact for the jury, and it is error for the court to decide it.

*Quere*, whether on the face of such agreement merely, each partner is not in case of a loss of capital bound to contribute his proportion to make it good to the others. *Yoke v. Barnet*, 3 W. & S. 81.

(*k*) *Wood v. Scoles*, 1 Ch. 369, is an instance of such a case.

(*l*) See *per* Lord Eldon in *Rowe v. Wood*, 2 Jac. & W. 558-9, and in *Goodman v. Whitcomb*, 1 ib. 593.

<sup>3</sup> See next page, *post*, and note.

purpose of removing whatever doubts there might otherwise be upon the subject. The usual nature and the general effect of such clauses will be adverted to in the next chapter, and the right to discovery in an action, will also be discussed hereafter. In the present place, it will be sufficient to observe, that it is the duty of every partner to keep precise accounts and to have them always ready for inspection. (*m*) One partner has no right to keep the partnership books in his own exclusive custody, or to remove them from the place of business of the partnership. (*n*) In the absence of an express agreement to the contrary, every partner has a right, without the permission of his co-partners, to inspect, examine, and make extracts from all the books of the firm (*o*); and no partner can deprive his co-partners of this right by keeping the partnership accounts in a private book of his own, containing other matters with which they have no concern. (*p*) At the same time, if a person entitled to a share of the profits of a business expressly agrees that he will accept the balance sheets prepared by others as correct, and will not investigate the books or accounts himself, he will be bound by that agreement. (*q*)

If no books of account at all are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a court, every presumption will be made against those to whose negligence or misconduct the non-production of proper accounts is due. (*r*)<sup>1</sup> If all the persons interested in the ac-

Effect of keeping no books or of destroying them.

(*m*) *Rowe v. Wood*, 2 Jac. & W. 558. See, too, 1 ib. 593, and 3 V. & B. 36.

(*n*) See *Taylor v. Davis*, 3 Beav. 388, note; *Greatrex v. Greatrex*, 1 DeG. & S. 692; *Charlton v. Poulter*, 19 Ves. 148, note.

(*o*) See *Stuart v. Lord Bute*, 12 Sim. 460; *Taylor v. Rundell*, 1 Ph. 222 and 1 Y. & C. C. C. 128. This right was not enforceable at law even in an action by one partner against another, *Ward v. Apprice*, 6 Mod. 264.

(*p*) See *Freeman v. Fairlie*, 3 Mer. 43; *Toulmin v. Copland*, 3 Y. & C. Ex. 655.

(*q*) See *Turney v. Bayley*, 4 DeG. J. & S. 332.

(*r*) See *Walmsley v. Walmsley*, 3 Jo. & Lat. 556; *Gray v. Haigh*, 20 Beav. 219.

<sup>1</sup> See *Bevans v. Sullivan*, 4 Gill, 383; *Gage v. Parmelee*, 87 Ill. 329; *Dimond v. Henderson*, 47 Wis. 172.

The powers of the partners are co-ordinate, whether the partnership is in active operation or subsist only for the purpose of winding up the affairs thereof and it is the duty of each partner to keep precise accounts of all his own transactions for the firm and to have them at all times ready for inspection. *Hall v. Claggett*, 48 Md. 224. See, also, *Beacham v. Eckford*, 2 Sandf. Ch. 116.

count are in *pari delicto*, this rule cannot be applied; but it is the duty of continuing or surviving partners so to keep the accounts

If there has been a total failure to do this it affords a good reason for a court of equity to decline to supply them, without a sufficient reason or excuse for the omission. A court of equity will not grope its way in utter darkness and undertake to create and establish a claim upon mere contingencies, or the preponderance of mere possibilities or probabilities. There is no duty devolving on it to assume the impracticable task of adjusting the relative rights of partners when the proof is utterly deficient and inconclusive. *Hall v. Claggett*, 48 Md. 224. See, also, *Bevans v. Sullivan*, 4 Gill, 382.

The presumption of law arising from the non-production or destruction of evidence by one party can not relieve the opposite party from the burden of proving his case. It will justify the admission of secondary evidence and when the evidence is conflicting, then the presumption will have its full operation and weight. *Gage v. Parmelee*, *supra*.

As to what extent the rule *in odium spoliatoris* will apply to a partner's partial destruction of records of his outside ventures, on the hearing of a bill for an account, see *Pomeroy v. Benton*, 57 Mo. 531.

On a bill by a fraudulent partner for an account, the master may charge him on any evidence which is competent or admissible as proof of the item; he cannot hold the injured partner to such degree of proof as would justify a charge, under ordinary circumstances, against a customer or partner; there must, however, be some proof. *Askew v. Odenheimer*, *Baldw.* 380.

In *Dimond v. Henderson*, *sup.*, it appearing that goods sold by weight or measure were taken from the store to be used in plaintiff's family without having

been weighed or measured, and that the accounts as shown by the books could therefore not be relied upon as accurate in that respect, the referee for trial did not err in resorting to other sources for information in order to get at the real amount and value of goods so used.

A member of a firm whose duty it is to keep the accounts, and who claims that he has omitted to enter credits to which he is entitled, will be required to make the most satisfactory proof of the mistakes he asks to have corrected. *Van Ness v. Van Ness*, 32 N. J. Eq. 669.

The accounts of the partners with the firm should not be blended with the individual accounts between the partners themselves. *Honore v. Colmesnil*, 1 J. J. Marsh. 517.

Where a mother and son verbally contract a planting partnership, and live together a long time, until her death, it will not be presumed that they kept regular accounts, nor will his failure to do so make him or his heirs liable. *Theall v. Lacey*, 5 La. Ann. 548.

When a partner takes possession of all the stock, books, etc., and in a settlement furnishes no evidence of the insolvency of the debtors or unsuccessful diligence in collecting the claims, they will be regarded as cash in his hands. *Bush v. Guion*, 6 La. Ann. 798.

"Courts of equity adopt very enlarged views, in regard to the rights and duties of agents; and in all cases, where the duty of keeping regular accounts and vouchers is imposed upon them, they will take care, that the omission to do so shall not be used as a means of escaping responsibility or of obtaining undue recompense. If, therefore, an agent does not, under such circumstances, keep regular accounts and vouchers, he will not be allowed the

of the firm, as at any time to show the position of the firm when a change among its members occurred. (s)

## 2. *In Companies.*

In large partnerships and companies, the duty of keeping accounts necessarily devolves upon the managers and directors, or persons superintended by them. The right of the shareholders to inspect such accounts is also necessarily limited; for if every shareholder were at liberty to examine the accounts whenever he desired to do so, it would be impracticable for the accounts ever to be kept or made up in a proper manner. The right of shareholders to inspect accounts is usually qualified by express agreement; but it requires no express agreement to confer the right, for that is a consequence of partnership: and where there is no agreement to the contrary, the writer apprehends that the shareholders are entitled to have them produced at their meetings and to appoint persons to inspect and examine them. If a company's deed of settlement provides for the inspection of its accounts by the shareholders at certain times and subject to certain restrictions, then, it seems, the shareholders are not entitled to inspect the accounts, otherwise than subject to the restrictions mentioned. (t) Nor does a right to inspect the books

compensation which otherwise would belong to his agency. Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own, if he mixes it up with his own, the whole will be taken, both at law and in equity, to be the property of the principal, until the agent puts the subject matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part. In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of his principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties; but

upon the ground that it is the only justice that can be done; and that it would be inequitable to suffer the fraud or negligence of the agent, to prejudice the rights of his principal." Story on Equity Jurisprudence, sec. 468. Every word of the above is applicable to the case of a partner acting as the agent of the firm. *Kelly v. Greenleaf*, 3 Story, 105.

(s) See *Ex parte Toulmin*, 1 Mer. 598, note; *Toulmin v. Copland*, 3 Y. & C. Ex. 655; and as to losing all right to interest by keeping the accounts improperly, see *Boddam v. Ryley*, 1 Bro. C. C. 239, and 2 ib. 2; and 4 Bro. P. C. 561, noticed *ante*, p. 789.

(t) See *Baldwin v. Lawrence*, 2 Sim. & Stu. 18. In *Hall v. Connell*, 3 Y. & C. Ex. 707, the Court disregarded the

of a company necessarily extend to the minutes of the meetings of the directors. (*u*)

It has been decided that a shareholder who, by the terms of a company's special act, is entitled at all seasonable times to inspect the books of the company, and who has applied for an \*inspection and has been refused, is not \*810 entitled to a mandamus against the company to allow inspection, unless, before inspection was refused him, he stated for what purpose he desired to see the books, and unless such purpose was, in the opinion of the Court, a reasonable purpose, and unless the refusal proceeded from the managing body. (*x*)

Mandamus to permit inspection.

When a person obtains from a court of justice an order to inspect for some purpose connected with a pending litigation, he is bound to conduct himself in a peaceable, decorous, and gentlemanly manner, and not to make public, or communicate to strangers to the litigation the contents of the documents he may have had produced to him. (*y*)

Inspection in an action.

The directors of a company have no power, by any resolution of their own, to exclude one or more of their number from access to the company's books. This has been decided in suits against directors who, in answers to interrogatories as to the contents of the books, have sworn ignorance of those contents, and inability to ascertain them, in consequence of orders given by the other directors to the officers having charge of the books not to allow them to be seen. This answer is insufficient, for the directors interrogated must, if necessary, enforce their right to examine the books, and time will be afforded them for that purpose. (*z*)

Right of a director to see accounts, &c.

Some acts of Parliament relating to companies, contain express

restrictive clauses; but see *Williams v. The Prince of Wales Life Co.* 23 Beav. 338, and *ante*, note (*q*); and as to the application of special rules after a winding-up order, see *Yorkshire Fibre Co.* 9 Eq. 650.

(*u*) *R. v. Maraguita Mining Co.* 1 E. & E. 289.

(*x*) *R. v. The Wilts and Berks Canal Co.*, 3 A. & E. 477; *R. v. The Grand Canal Co.* 1 Ir. Law Rep. 337. See, too, *R. v. Clear*, 4 B. & C. 899. In an ac-

tion for calls the Court will not order the company to produce its books in order to enable the shareholders to fish out a defense, *Birm., Bristol, &c. Co. v. White*, 1 Q. B. 182.

(*y*) *Williams v. Prince of Wales' Life Ass. Co.* 23 Beav. 338.

(*z*) See *Taylor v. Rundell*, 1 Y. & C. C. 128, and 1 Ph. 222. See, too, *Stuart v. Lord Bute*, 12 Sim. 460; *Turquand v. Marshall*, 6 Eq. 112, which, however, was reversed, 4 Ch. 376.

Statutory enactments relating to companies' accounts. enactments upon the subject of accounts, and especially as to their audit and the right of the shareholders to examine them. These enactments, so far as they are contained in public general statutes now in force, are confined to companies governed by the Companies clauses consolidation act, 8 & 9 Vict. c. 16, and the Companies act, 1862, and the Life Assurance Companies act, 1870.

\*811 *\*As to companies governed by the companies clauses consolidation act.*

Accounts of companies governed by 8 & 9 Vict. c. 16. The 8 & 9 Vict. c. 16, contains several provisions relating to the appointment and duties of auditors, and to the keeping and inspection of accounts, the general effect of which is as follows. (a) Two auditors (or such other number, if any, as the company's special act may require) are to be elected by the shareholders, and one auditor is to go out of office every year, but may be re-elected. The directors are to deliver to the auditors, accounts and balance sheets before every ordinary meeting of shareholders, and the auditors are to examine the same, and either report upon them or simply confirm them, and the auditors' report or confirmation is to be read at the meeting. (b) The directors are required to have proper accounts kept of all moneys received or expended on account of the company, and to appoint a book-keeper to keep the accounts. The books of the company are to be balanced at the periods prescribed in the company's special act; and if no period is prescribed, fourteen days at least before each ordinary meeting. On the books being so balanced, a balance sheet is to be made up and signed by the chairman or deputy chairman of the directors, and such balance sheet is to exhibit a true statement of the capital, stock, credits and property of every description belonging to the company, and the debts due by the company, and a distinct view of the profits or loss which may have arisen on the transactions of the company in the course of the preceding half-year. The books so balanced, and the balance sheet, are required to be open for the inspection of the shareholders at

(a) §§ 101-108 and 116-119, and as to taking security from officers entrusted with money belonging to the company, and to the summary method of making them account, see §§ 109-114. See,

also, 30 & 31 Vict. c. 127, § 30.

(b) the audit does not bind the shareholders. *Bloxam v. Metropolitan Rail. Co.* 3 Ch. 337.

the principal office or place of business of the company for fourteen days before, and one month after every ordinary meeting, if no other periods are prescribed by the company's special act, and during those periods the shareholders have a right to see the books and to \*take copies and extracts therefrom; but they \*812 are not entitled to demand an inspection of such books at any other time, unless in virtue of an order signed by three directors. (c)

*As regards companies governed by the companies act, 1862.*

The companies act, 1862, contains, as will be seen hereafter, some enactments relating to the production of books and accounts to inspectors specially appointed; but, with Accounts of companies governed by the act of 1862. some exceptions, to be noticed presently, the act leaves each company to make what regulations it pleases respecting the keeping, inspection, and auditing of accounts on ordinary occasions. By the regulations, however, in Table A., appended to the act (d), the directors are to cause true accounts to be kept of the stock in trade, receipts, expenditure, credits and liabilities of the company. These books are to be kept at the registered office of the company, and are to be open to the inspection of the shareholders during the hours of business, subject to any reasonable restrictions, as to the time and manner of inspection, that may be imposed by the company in general meeting. (e) The directors are required to lay before the shareholders, once a year at least, a statement of the income and expenditure of the company (f), and also a balance sheet containing a summary of the property and liabilities of the company, and a printed copy of such balance sheet is to be sent to every shareholder. (g)

The accounts of the company and the balance sheets are to be examined by one or more auditors, the first of whom Audit. are to be appointed by the directors, but the others by the company at a general meeting. (h) If no election is made, the

(c) See, also, as to loan capital accounts of railway companies, 29 & 30 Vict. c. 108.

(d) By 25 & 26 Vict. c. 89, § 15, the regulations in Table A. apply to all companies limited by shares, and formed under that act, with the exception of

such of those companies as have other regulations inconsistent with them.

(e) 25 & 26 Vict. c. 89, Table A. No. 78.

(f) Ib. Nos. 79 and 80.

(g) Ib. Nos. 81 and 82

(h) Ib. Nos. 83 and 84.

Board of Trade is empowered, upon the application of one-fifth in number of the shareholders, to appoint an auditor to

\*813 \*be paid by the company. (*i*) The auditors are at all reasonable times to have access to the books and accounts of the company, and are empowered to employ accountants at the expense of the company, to assist in the investigation of the accounts; they are also empowered to examine the directors and other officers of the company, with reference to its accounts. (*k*) The auditors are required to report upon the accounts and balance sheets, and their reports are to be read to the shareholders at the general meetings. (*l*) No director, and no person interested otherwise than as a member of the company in any of its transactions, can be an auditor. (*m*)

In addition to these regulations, the Companies act, 1862, enacts (*n*) that, upon the application of a certain number of Inspection by Board of Trade; the shareholders of any company registered under it, the Board of Trade may appoint inspectors to examine and report on the affairs of the company; and such inspectors are empowered to call for and examine all the company's documents and books, and to examine the officers and agents of the company upon oath. The expenses of the inspectors are to be defrayed by the shareholders upon whose application they were appointed.

Instead of applying to the Board of Trade, the shareholders themselves may, by special resolution, appoint inspectors or by inspectors specially appointed by the company. for the purpose of examining into the affairs of the company, with the same powers as are conferred upon inspectors appointed by the Board of Trade. (*o*) A copy of the report of the inspectors, authenticated by the seal of the company, is admissible in evidence in any legal proceeding. (*p*)

Every limited banking company, and every insurance company, Statements to be made by banking, insurance and other companies. and every deposit, provident, and benefit society governed by the Companies act, 1862, is bound, before it begins business, and twice a year whilst it carries on business, to make a statement in a prescribed form, showing the state of its assets and liabilities; and a copy of such statement is to be kept in some conspicuous place in the registered office of the company, and in every branch office where its business is carried

(*i*) 25 & 26 Vict. c. 89, Table A. No. 91.

(*k*) Ib. No. 93.

(*l*) Ib. No. 94.

(*m*) 25 & 26 Vict. c. 89, No. 86.

(*n*) Ib. §§ 56 and 59.

(*o*) Ib. § 60.

(*p*) Ib. § 61.

on, and \*every member and creditor of the company is en- \*814  
titled to a copy of such statement or payment of sixpence, (q)

*As regards companies governed by the Life Assurance Companies Act, 1870.*

By 33 & 34 Vict. c. 61 (r), all life assurance companies, other than those registered under the acts relating to friendly societies, are required to make out annually statements of their revenue accounts and balance sheets, and to lay the same before the Board of Trade and to furnish printed copies to their shareholders and policy-holders.

### SECTION III—OF FALSE AND FRAUDULENT ACCOUNTS.

Before quitting the subject of accounts it is necessary to draw attention to certain important statutory enactments relating to false and fraudulent accounts. The act 24 & Fraudulent accounts.  
25 Vict. c. 96, consolidating the statutes relating to larceny and other similar offenses, declares amongst other things that—

§ 82. Whosoever, being a director, public officer or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or to direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned. (s) 24 & 25 Vict. c. 96. Directors keeping fraudulent accounts.

§ 83. Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit, or concur in omitting any material particular, in any book of account or other document, shall be guilty of a \*misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned. \*815 Directors &c., destroying books, &c.

(q) 25 & 26 Vict. c. 89, § 44, and Schedule 1, Form D.

(r) Amended by 34 & 35 Vict. c. 58; 35 & 36 Vict. c. 41.

(s) i. e., by § 75, penal servitude for

not more than seven nor less than three (now five) years; or imprisonment for not more than two years, with or without hard labor, and with or without solitary confinement.

§ 84. Whosoever, being a director, manager, or public officer of any body corporate or public company shall make, circulate, or publish, or concur in making, circulating, or publishing any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as herebefore last mentioned.

§ 85. Nothing in any of the last ten preceding sections of this act contained shall enable or entitle any person to refuse to make a full and complete discovery in such cases. discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall, at any time previously to his being charged with such offense, have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

The Companies act, 1862, also declares, that if any director, officer, or contributory of any company wound up under that act, destroys, mutilates, alters, or falsifies any books, papers, writings or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or other document belonging to the company, with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labor. (t) The same act also contains provisions by which directors and others may be ordered to be criminally prosecuted for offenses relating to a company being wound up. (u)

Independently of all statutory enactments, moreover, persons who conspire to defraud others by false representations as to the solvency of companies are indictable. In the notorious case of the Royal British Bank, the directors were indicted and convicted of the common law offense of a conspiracy to induce persons to become share-

Indictment for conspiracy.

\*S16

(t) 25 & 26 Vict. c. 89, § 166.

(u) Ib. § 167, 8.

holders in and customers of the bank by issuing false and fraudulent reports respecting its condition and solvency (*x*); and in the equally notorious case of the Eupion Fuel and Gas Company, the directors were indicted and convicted of a conspiracy to defraud by fraudulently obtaining a settling day from the Stock Exchange Committee, with intent to induce persons to deal in shares of the company in the belief that it was duly formed and constituted. (*y*)

It has already been seen that an action for damages will lie against directors and others who issue false reports, and thereby induce persons to take shares in a company (*z*); and it will be seen hereafter that an action may be maintained to rescind contracts entered into with a company on the faith of such reports. (*a*)

(*x*) *R. v. Esdaile*, 1 Fos. & Fin. 213. See, also, *per* Lord Campbell in *Burnes v. Pennell*, 2 H. L. C. 497.

(*y*) *R. v. Aspinall*, 1 Q. B. D. 730, and 2 Q. B. D. 48. See, also, *R. v. Timothy*, 1 Fos. & Fin. 39, and *R. v.*

*Gurney Finlaison's Report*, and for obtaining money under false pretenses. *R. v. Watson*, 4 Jur. N. S. 14; 24 & 25 Vict. c. 96.

(*z*) See *ante*, p. 324.

(*a*) *Infra*, book iii. c. 10, § 3.

## OF PARTNERSHIP ARTICLES AND COMPANIES' REGULATIONS.

## SECTION I.—GENERAL OBSERVATIONS.

THE rights and obligations of partners *inter se*, are generally, to a certain extent, regulated by special agreement, the true meaning of which is to be ascertained by the ordinary rules of construction. (a)<sup>1</sup>

In considering the effect, however, of partnership articles, the following principles are to be borne in mind:—

1. In the first place, partnership articles are not intended to define, and are not construed as defining *all* the rights and obligations of the partners *inter se*. A great deal is left to be understood.<sup>2</sup> The maxim *expressum facit cessare tacitum* naturally applies to partnership articles

Partnership articles are not intended to define all the rights and duties of partners.

(a) See Chapter X. of Story on Part.; Collyer on Part. 137, &c. See, also, the head Partnership in Jarman and Bythewood's Conveyancing and Davidson's Conveyancing.

<sup>1</sup> See Jackson v. Crapp, 32 Ind. 422; Bird v. Hamilton, Walk. Ch. 361.

When the terms of a partnership have been reduced to writing, the written articles are presumed to contain all the conditions of the partnership. Boardman v. Close, 44 Iowa, 428.

Where a written co-partnership agreement is doubtful, the subsequent conduct of the partners under it is admissible in aid of the construction of the agreement on the question of intent. Beacham v. Eckford, 2 Sandf. Ch. 116.

An agreement to sell, only as an

auxiliary to the higher object of forming a partnership, subjects the property to the terms of the partnership and the intention of the partners, as evidenced by the double contract of sale and partnership. Thompson v. Mylne, 6 La. Ann. 80.

<sup>2</sup> Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships except so far as the general usage of persons engaged in similar pursuits, or the established practice the particular company has established a different rule—the only difference generally existing being such as flow from the fact that in such partnerships there is no *delectus personarum*. Jones v. Clark, 42 Cal. 180.

as to other agreements; but the rights and obligations of partners, so far as they are not expressly declared, are determined by general principles, which are always applicable where not clearly excluded. In the language of Lord Langdale in *Smith v. Jeyes* (b), Smith v. Jeyes. “The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in \*force, does not reach to all those duties and obligations,\*818 they are implied and enforced by the law; and it is often matter to be collected and inferred from the conduct and practice of the parties, whether they have held themselves, or ought or ought not to be held, bound by the particular provisions contained in their express agreement. When it is insisted that the conduct of one partner entitles the other to a dissolution, we must consider not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract.” (c)

2. The attainment of the objects which the partners have declared they had in view is always regarded as of the first importance. All the provisions of the articles are to be construed so as to advance and not to defeat those Articles to be construed with reference to the objects of the partners. objects; and however general the language of partnership articles may be, they will be construed with reference to the end designed, and, if necessary, receive a restrictive interpretation accordingly. (d) This rule is of especial importance in considering the limits of general powers conferred on committees, directors, and others. For example, in *Chapple v. Cadell* (e) the proprietors of a Chapple v. Cadell. newspaper entrusted the management of the paper to a committee of five, and gave them power to call general meetings, and agreed that the resolutions of the majority present at such meetings should be binding on all the proprietors. A meeting was convened, and the majority present resolved that the paper and the

(b) 4 Beav. 505. See, too, *Nelson v. Bealby*, 30 Beav. 472, and *Browning v. Browning*, 31 Beav. 316, as to the non-application of the maxim *expressio unius est exclusio alterius*.

(c) See, too, *Blisset v. Daniel*, 10 Ha. 522.

(d) See Coll. on Part. 137.

(e) Jac. 537.

shares of all the proprietors in it should be sold by auction. But it was held that the majority had no power to sell the shares of a dissentient and protesting minority.

So, in *The Official Manager of the Athenæum Life Assurance Society v. Pooley* (*f*), a clause in the deed of settlement of a life insurance society, declaring that the business of the society should be, amongst other things, to purchase, sell, and re-sell life, reversionary, and other personal estates and interests, was held not to authorize the purchase of Westminster Improvement Bonds. And accordingly, some debentures of the society which had been improperly given as the \*819 \*consideration for a sale of such bonds to the society, were held not to be binding on the society, even in the hands of a purchaser for value, without notice of the circumstances under which the debentures were issued.

Upon the same principle, general powers of management do not authorize directors to amalgamate one company with another, either by selling the assets and liabilities of their own company, or by purchasing those of another company. (*g*)

Other illustrations of the same principle will be found in that part of the work which treats of the powers of majorities.

Conformably with the same rule.

3. Any provision, however worded, will, if possible, be construed so as to defeat any attempt by one partner to avail himself of it for the purpose of defrauding his copartner.' Articles to be construed so as to defeat fraud; Thus it is very common for partners to agree that half-yearly accounts shall be made out and signed, and not be afterwards disputed; but, notwithstanding such a clause, if one partner knowingly makes out a false account, and his co-partners sign it upon the faith that it is correct, they will not be bound by it. (*h*) Again,

(*f*) 1 Giff. 102, and 3 DeG. & J. 294.

(*g*) *Ernest v. Nicholls*, 6 H. L. C. 419; *Re The Era Assurance Co.* 2 J. & H. 400; *Re The Saxon Life Assurance Society*, ib. 408, and 1 DeG. J. & Sm. 29; *Gilbert v. Cooper*, 10 Jur. 580; *Beman v. Rufford*, 1 Sim. N. S. 550; *Clay v. Rufford*, 5 DeG. & S. 768. Compare *Anglo-Australian Assurance Co. v. British Prov. Society*, 3 Giff. 521, and on appeal, 4 DeG. F. & J. 341, where there appears to have been power to amalga-

mate.

<sup>1</sup> An agreement between partners, to keep their partnership a secret, and maintain a fictitious competition, for the purpose of deceiving the public, would be illegal and void; but such a purpose will not be imputed, by construction, to partnership articles, unless clearly evinced. *Fairbank v. Leary*, 40 Wis. 637.

(*h*) See *Oldaker v. Lavender*, 6 Sim. 239.

it is by no means unusual for partners to agree that yearly accounts shall be taken, and that, in the case of the death of a partner, his representatives shall be paid his share as appearing in the last account, with interest instead of subsequent profits; but if the partners do not for several years make out any accounts, and then one of them dies, the survivors are not entitled to act on the letter of the agreement, and pay only the amount which in the last account was carried to the credit of the deceased, with interest on such amount. (i)

4. Every power conferred by the articles on any individual partner, or on any number of partners, is deemed to be conferred with a view to the benefit of the whole concern; and the taking of unfair advantages. and an abuse of such power, by an exercise of it, warranted perhaps by \*the words conferring it, but not by the truth \*820 and honor of the articles, will not be countenanced. Thus, in a case which has been already frequently referred to (k), a power to expel any partner was vested in the holders of two-thirds of the shares in the firm; but it was held that, although this power was so framed that it might be exercised without any reason being assigned, it could not be put in force for the unfair purpose of obtaining the share of the expelled partner at less than its value.

5. Any article, however express, is capable of being abandoned by the consent of *all* the partners; and this consent may be evidenced, not only by express words, but by Provisions may be waived by tacit agreement. conduct. (l)<sup>1</sup>

The maxim *modus et conventio vincunt legem* is especially applicable to cases of this description. In the language of Lord Eldon, "In ordinary partnerships nothing is more clear than this, that, although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or ac-

(i) *Pettyt v. Janeson*, 6 Madd. 146.

(k) *Blisset v. Daniel*, 10 Ha. 493. See, also, *Wood v. Woad*, L. R. 9 Ex. 190.

(l) This rule appears to be of comparatively modern date; it was not acted on in *Smith v. The Duke of Chandos*,

Barn. 419.

<sup>1</sup>See *Boisgerand v. Wall*, 1 Sm. & M. Ch. 404; *Robbins v. Laswell*, 27 Ill. 365; *McGraw v. Pulling*, 1 Freem. Ch. 357; *Boyd v. Mynatt*, 4 Ala. 79.

cept bills of exchange in his own name, without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this Court will hold that they have varied the terms of the original agreement in that respect." (*m*)

This principle was acted on by Lord Eldon in a case where the partners had agreed that annual accounts should be taken, and that in case of the death of a partner, his representatives should be paid an allowance instead of profits; for it appeared \*that for some years no accounts had been taken, and that the partners had engaged in transactions of such a nature, that it would have been unfair to have applied the original agreement. (*n*). So a practice treating losses as bad when discovered so to be, was held to apply as between the executors of a deceased partner and the surviving partners, although the effect was to give the executors much more than they would otherwise have been entitled to. (*o*) So, where articles contained a stipulation that the partners should contribute to losses and share profits in a certain proportion, and it appeared that a person who managed the affairs of the firm had always received a share of the profits, but had never been called upon to contribute to losses, it was held, that assuming him to be a partner in the proper sense of the term, and to have been originally bound by the articles to contribute to losses, the articles, so far as they obliged him so to contribute, had been varied by the conduct of the parties, and were no longer binding on him. (*p*)

If it is proposed to make an alteration in the articles by an agreement which shall be binding on all parties, notice of the proposed change and of the time and place at which it is to be taken into consideration, ought to be given to all the partners. (*q*) For, even if the change is one which it is competent for a majority to make against the assent of the minority, all are entitled to be heard upon the subject; and unless all have an opportu-

(*m*) *Const. v. Harris*, T. & R. 523. See, also, *Coventry v. Barclay*, 33 Beav. 1, and on app. 3 DeG. J. & Sm. 320; *Pilling v. Pilling*, 3 DeG. J. & Sm. 162; *England v. Curling*, 8 Beav. 133 and 137; *Somes v. Currie*, 1 K. & J. 605, and the cases in the next three notes.

(*n*) See *Jackson v. Sedgwick*, 1 Swanst. 460; *Pettyt v. Janeson*, 6 Madd. 146; *Simmons v. Leonard*, 3 Ha. 581.

(*o*) *Ex parte Barber*, 5 Ch. 687.

(*p*) *Geddes v. Wallace*, 2 Bli. 270.

(*q*) See *Const v. Harris*, T. & R. 524.

nity of opposing the change, those who object to it will not be bound by the others. (r)<sup>1</sup>

In large partnerships, and in companies, the original articles can seldom, if ever, be varied, unless there is some power to vary them expressly conferred by the charter or statute by which the company is governed or by the articles themselves. Except where there is such a power no variation can be made by directors or by a majority of shareholders; and it is scarcely possible to obtain the consent of all the shareholders, or to bind

\*them all by acquiescence in a particular line of conduct different from that prescribed by the articles. (s) At the same time, if any individuals, be they shareholders or directors, choose to ignore the articles, and not to observe the provisions contained in them, those individuals cannot afterwards object to the validity of a course of conduct adopted or acquiesced in by them on the ground that it is not warranted by the articles;<sup>1</sup> but their adoption or acquiescence in no way affects the rights and obligations of the other shareholders, either *inter se* or as between them and the acquiescing parties. On this ground, the non-observance of prescribed formalities has over and over again been held to be of no consequence as between acquiescing shareholders, and yet to be fatal as between them and other non-assenting shareholders. (t)

But although it is difficult in the case of a company to obtain

(r) *Ib.* 525, see, also, *ib.* 518

<sup>1</sup> If several persons enter into a written agreement of partnership, and the majority alter the agreement in a material point, those who do not assent may retire from the firm, provided they do it within a reasonable time, and under reasonable circumstances. *Abbot v. Johnson*, 32 N. H. 9. See, also, *Livingston v. Lynch*, 4 John. Ch. 573.

(s) See *Ex parte Sargent*, 17 Eq. 273; *Keane's Executors' case*, 3 DeG. M. & G. 272.

<sup>1</sup> In a secret partnership for carrying on the business of planting, it is competent to prove the usages and customs of that business for the purpose of showing that the contract on which the secret partner is sought to be charged was sanctioned by those usages and customs.

*Lea v. Guice*, 21 Miss. 656.

Usage may make an incidental business so far the regular business of a partnership as to make all the partners in a firm bound by the contract of one in such incidental business. As, for example, the usage among the boatmen on a certain river to undertake to sell, as well as to carry, cotton, may make a firm engaged in the carrying trade responsible for the selling and bringing back the proceeds, as well as carrying cotton, upon a contract made between the owner of the cotton and one of the firm of boatmen. *Galloway v. Hughes*, 1 Bailey, 553.

(t) Compare, for example, *Keene's Executor's case*, 3 DeG. M. & G. 272, and *Straffon's Executors' case*, 2 DeG. M. & G. 576.

Effect of practice of company.

such consent from its shareholders as will warrant the conclusion that its original regulations are no longer to be considered binding, attention must, nevertheless be paid to the practice of the company with respect to all such matters as to which it is competent for the majority to bind the minority. In deciding upon the effect of a company's act, charter, or deed of settlement, the practice of the company will be taken into account, unless it has been clearly illegal (*u*); or, in a company governed by the Companies act, 1862, contrary to its articles of association. (*v*)

It seems that a person who comes into a firm through another who has acquiesced in a variation of the terms of partnership articles, is bound by that acquiescence, and cannot revert to the original articles (*w*); and this principle has been applied to companies. (*x*)

Original articles apply to partnership continued under them.

6. The last general rule which it is necessary to notice is \*this: if a partnership, originally entered into for a definite time, is continued after the expiration of that time, without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners *inter se*. (*y*)<sup>1</sup>

King v. Chuck.

Thus in *King v. Chuck* (*z*), three partners, A., B., C., agreed that if either of them should die, his capital as appearing by the last account, should be paid to his representatives by the surviving partners, on whom the trade was then to devolve. A. died, and this agreement was acted on, and B. and C. continued in partnership without coming to any fresh agreement. Then B.

(*u*) See *Somes v. Currie*, 1 K. & J. 605; *Marino's case*, 2 Ch. 496; *Bush's case*, 6 Ch. 246.

(*v*) See *Ex parte Sargent*, 17 Eq. 273.

(*w*) See *Const v. Harris*, T. & R. 524.

(*x*) *Ffooks v. South-Western Rail.* Co. 1 Sm. & G. 142; *Peek v. Gurney*, 13 Eq. 79.

(*y*) See *Crawshay v. Collins*, 15 Ves. 228; *Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Booth v. Parkes*, 1 Molloy 465.

<sup>1</sup> See *Miffin v. Smith*, 17 Serg. & R. 165; *Bradley v. Chamberlin*, 16 Vt. 613; *U. S. Bank v. Binney*, 5 Mason, 185;

*Robertson v. Miller*, 1 Brock. 466.

A partnership having expired by the limitation in the articles, A, one partner, transmitted the articles to B, the other, with a renewal indorsed thereon, which B agreed to, provided he should be relieved from his difficulties by the arrival of a certain ship. The ship arrived, and B resumed his duties as partner: *Held*, that the partnership was renewed for the original term, though there was no formal renewal. *Dickinson v. Bold*, 3 Dessau, 501.

(*z*) 17 Beav. 325.

died, and it was held that B. and C. had in fact continued in partnership on the old terms, and that B.'s executors were therefore to be paid the amount appearing to be his capital in the last account come to between him and C.

Even where a partnership is entered into for a term of years, and the articles provide for events happening *during the term*, the above rule is still applied. Thus, where two persons agreed to become partners for fourteen years, and stipulated that if either died *during this co-partnership term*, his share should be taken by the other at a certain sum, and the fourteen years expired, and the two persons continued in partnership together, without coming to any fresh agreement, and then one of them died : it was held that the above stipulation was binding, and that the share of the deceased belonged to the survivor upon payment of the sum mentioned. (a) The expression, "the partnership term," seems to be equivalent to the time during which the partners continue in partnership without coming to any fresh agreement.

Provisions applicable during the term of partnership.

Clauses giving a right of pre-emption, (b) and a right of expulsion, (c) have been held not to apply to a partnership \*continued after the expiration of the time for which it was \*824 originally entered into. But an arbitration clause has been held to apply. (d)

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## SECTION II.—OF DIRECTORY AND IMPERATIVE CLAUSES

Some clauses in partnership articles and companies' deeds of settlement are *optional*, some are *directory* only, and some are *imperative*. It is important not to confound these three different classes of clauses; and as the characteristics of each are not apparent from the words used to denote them, it is necessary to examine and define those characteristics as accurately as possible. The chief obscurity arises from the unfortunate use of

Distinction between optional, directory, and imperative clauses.

(a) *Essex v. Essex*, 20 Beav. 442.

(b) *Cookson v. Cookson*, 8 Sim. 529. This case turned on the language of the articles by which the right of pre-emption was to be exercised before the end of the number of years for which the partnership was to last. But *quære*

whether this is sufficient to exclude the rule in question. See *Essex v. Essex*, *ubi supra*.

(c) *Clark v. Leach*, 32 Beav. 14, and 1 DeG. J. & Sm. 409.

(d) *Gillett v. Thornton*, 19 Eq. 599.

the words *directory* and *imperative*. These words are employed not only when speaking of agreements, but also when speaking of acts of Parliament; and an examination into their meaning when so used, will greatly facilitate an inquiry into their meaning when applied to less authoritative rules.

All laws are in one sense necessarily imperative; for if no consequences whatever result from the disobedience of a law that law is in fact no law at all. When, therefore, laws are divided into those which are imperative and those which are directory, the division must have reference to some particular kind of consequence resulting from their non-observance. (*e*) Nullity appears to be this consequence; and a law which directs a certain act to be done in a certain way, and declares that no other way shall for any purpose be equivalent to the way prescribed, is said to be imperative; whilst another law which also directs a certain act to be done in a certain way, but does not render every other way of no avail, is said to be directory only; although the consequence of not complying with its directions may be in the highest degree penal. The following may be referred to as instances illustrating this distinction:—

\*§25 \*By the 4 Geo. 4, c. 76, § 16, it was enacted that the father, if living, of any party under twenty-one years of age, should

Examples of  
directory stat-  
utes, *R. v.*  
*Birmingham*.

have authority to give consent to the marriage of such party, and if the father was dead, then that other persons mentioned in the act should have such authority;

and the act then went on thus: "And such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent." A person who was under twenty-one, and whose father was living, married without his consent. It was held that the marriage was nevertheless valid; for the legislature evidently did not intend to bastardize the issue of marriage solemnized without the consent required. (*f*) Again, it has been held that a covenant by a municipal corporation

*Payne v.*  
*Brecon*.

to repay money borrowed, is valid, although the money is not borrowed for any purpose to which the borough

(*e*) It must be remembered that persons who willfully violate the provisions of an act of Parliament are, in strictness, guilty of a misdemeanor, and indictable accordingly, although there

may be no specific penalty annexed to the violation. See *per* Lord Campbell, in Longworth's case, 1 DeG. F. & J. 31.

(*f*) *R. v. Birmingham*, 8 B & C. 29.

fund is made applicable by the Municipal corporation act, and although the deed containing the covenant has not been approved by the Lords of the Treasury as required by the same act. (*g*) So it was held, that a rate made under the Public Health act of 1848 was valid, although that statute requires all rates made or collected under it, to be published in the same manner <sup>Le Feuvre v. Miller.</sup> as poor-rates, and the rate in question had not been published in the manner required. (*h*)

In each of these cases, the statute in question was said to be directory only; and to each of them the maxim *Fieri non debuit sed factum valet*, was held applicable. In each case something was to be done in a particular manner; but whatever may have been the consequences of doing it in some other manner, the invalidity of what was done was not one of those consequences; and this appears to be the test whereby to decide whether a law is directory or imperative as those terms are customarily employed. (*i*)

A law which is directory, is a law in the true sense of the \*word, and imposes an obligation <sup>\*826</sup> or duty; and in this respect it differs from the expression of a desire, which those to whom it is addressed may lawfully comply with or not at their pleasure. In other words, compliance with a law which is directory is not optional. <sup>Observations on the word directory.</sup>

Passing now to partnership articles and companies' regulations and deeds of settlement, it will be found that the words directory and imperative are not always employed, when speaking of them, in the strict sense above explained. There is a tendency to overlook the difference between an optional and a directory clause, and to use the word imperative in the sense of binding on the majority; and this tendency has led to no little confusion. If a clause is directory, in the sense of not rendering invalid that which is done otherwise than in the mode it prescribes; and if, as frequently happens, those who do not observe its directions are in no worse position than those who do, it is clear that the clause is one, the observance of which is practically optional. To call such a clause directory leads to nothing but <sup>Directory and imperative as applied to partnership articles, &c.</sup>

(*g*) *Payne v. Brecon*, 3 H. & N. 572.

(*h*) *Le Feuvre v. Miller*, 8 E. & B. 321.

(*i*) For other instances of directory statutory enactments, see *R. v. Ingall*, 2 Q. B. D. 199; *Hunt v. Hibbs*, 5 H. &

N. 123; *Brumfit v. Bremner*, 9 C. B. N.

S. 1; *R. v. Rochester*, 7 E. & B. 910;

*Lancaster, &c. Rail. Co. v. Heaton*, 8

E. & B. 952; *Caldow v. Pixell*, 2 C. P.

D. 562.

confusion. A clause is optional, not directory, if no consequence results from its non-observance.

A clause may be optional, although the presumption against its being so is strong; for when shareholders sign deeds containing clauses directing those entrusted with the management of their affairs to do certain things in a certain way, the inference is that those clauses were not inserted for nothing, and that the directions contained in them were intended to be obeyed. If, however, a clause is optional, it is not directory in the sense above explained. On the other hand, a clause which is not optional may be directory, or it may be imperative: but no clause can be either, if its observance or non-observance is a matter of perfect indifference; or, in other words, if the legal consequences of observance and non-observance are precisely the same.

Again, the word directory is occasionally employed to denote clauses the non-observance of which is said to be of no consequence under certain circumstances. If, under the circumstances supposed, observance or non-observance is a matter of no consequence whatever, the term directory is evidently used in the sense of optional; but, if by no consequence is meant \*no such consequence as that contended for (there being some other consequence), then the term directory is not misapplied.

The distinction between directory and imperative clauses turns, neither on the right to repeal them, nor on the right of infringing them, but on the consequence of infringing them whilst they are in force; and whilst the consequence of infringing an imperative clause or regulation is the nullity of what is done, the consequence of infringing a directory clause or regulation is not nullity, but something different.

It follows from the foregoing observations that the power of a majority to alter, suspend, or repeal any clause in a company's deed of settlement, or any regulation established for the conduct of the company's affairs, does not, properly speaking, depend upon whether the clause or regulation whilst in force is directory or imperative; but upon whether it is, as regards the majority, optional or not. This turns, as has been already seen (*k*), on the question whether the clause is *fundamental* or *subsidiary*, *i.e.*, upon whether it can or cannot be repealed or de-

Clauses non-observance of which is of no consequence.

Misuse of the term imperative.

Clauses optional with the majority.

(*k*) *Ante*, p. 598, *et seq.*

parted from consistently with the objects for, and terms on, which the company was formed. The division of clauses into *fundamental* and *subsidiary*, and into *imperative* and *directory*, are cross divisions, and are based on different principles.

The division into fundamental and subsidiary has reference to the power to repeal or alter; whilst the division into imperative and directory has reference to the consequence of non-observance whilst in force. The last division, moreover, applies as well to fundamental as to subsidiary clauses. A fundamental clause, however, cannot be optional. The cross divisions may be represented thus:—

1.	{	<i>fundamental</i> . .	{	<i>imperative.</i>	
				<i>directory.</i>	
	{	<i>subsidiary</i> . . .	{	<i>optional.</i>	
				<i>imperative.</i>	
				<i>directory.</i>	
2.	{	<i>optional</i>	{	<i>imperative</i> . . .	
				<i>directory</i> . . .	
				{ <i>fundamental.</i>	
	{	<i>non-optional</i> . .	{	<i>imperative</i> . . .	
				<i>directory</i> . . .	
				{ <i>fundamental.</i>	
				{ <i>subsidiary.</i>	
				{ <i>fundamental.</i>	
				{ <i>subsidiary.</i>	

\*What the precise consequence of not observing a directory clause may be, depends in each case upon the act, charter, deed of settlement or regulations of the company. If no particular consequence can be pointed out, that very circumstance might be supposed to confer upon the minority a right to judicial assistance for the purpose of having the affairs of the company properly carried on. For although a majority cannot be controlled in the exercise of powers which legitimately belong to them, they may properly be prevented from exercising powers which do not belong to them; and interference for the purpose of preventing them from infringing a non-optional but directory clause or regulation, is clearly warranted by this principle. Indeed, such interference would appear to be the more called for, as without it a confessedly non-optional clause becomes, in the case supposed, a mere dead letter. This, however, is not exactly the view taken by courts of justice. In determining whether they will or will not interfere with the management of the affairs of the company, Courts regard not so much the question whether what is being done is contrary to an imperative or directory clause, but whether it is contrary to a fundamental or subsid-

itary clause. If a subsidiary clause only is being infringed, the Court will not interfere except to protect a majority against a minority; whilst if a fundamental clause is being infringed, the Court will interfere to protect a minority against a majority. (*l*)

Having pointed out what the writer conceives to be the true meaning of the word directory, as distinguished from imperative on the one hand and optional on the other, it is proposed to notice a few cases in which clauses certainly not intended to be optional with the directors have been held to be subsidiary, and not fundamental, and to be directory, and not imperative, although the consequences of disregarding those clauses are by no means apparent.

In *Foss v. Harbottle* (*m*), an act of Parliament incorporating the Victoria Park Company, declared that it should be in the power of a certain number of shareholders, acting in a certain manner, and observing certain forms, to require the directors \*to convene extraordinary meetings, and in case of their default, to convene such meetings themselves. A question having arisen how far it was necessary to adhere strictly to the letter of the enactment, in order to give validity to the acts of a meeting convened under it, the Vice-Chancellor, Sir James Wigram, expressed a strong opinion that the acts of a meeting convened in substantial compliance with the statute would be valid, although all the prescribed forms had not been observed. He considered the statute to be in this respect directory only.

In *The Thames Haven and Dock Railway Company v. Rose* (*n*), a private act of Parliament directed that the business of a company should be carried on by twelve directors, of whom five should be a quorum; and the Court of Common Pleas was of opinion that the act was in this respect directory only, and that calls made by five out of seven directors, there being no more, were valid. (*o*)

Again, it has more than once been held that when a company is incorporated by charter, or act of Parliament, which directs the observance of certain forms before the corporate seal is annexed to contracts purporting to bind the body corporate, a contract under the corporate seal, and of a

Examples of  
so-called direc-  
tory clauses.

Holding of  
meetings.

\*829 forms, to require the directors \*to convene ex-  
traordinary meetings, and in case of their de-

Quorum of  
directors.

Cases where a  
document has  
been informal-  
ly sealed.

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the body corporate, a contract under the corporate seal, and of a

(*l*) This subject will be examined hereafter. See book iii. ch. 10, § 3.

(*m*) 2 Ha. 461.

(*n*) 4 Man. & Gr. 552.

(*o*) Compare *Kirk v. Bell*, 16 Q. B. 290, and other cases cited *ante*, p. 244.

kind authorized by the charter or statute, is binding on the corporation, although the seal may have been annexed without the observance of the prescribed formalities. (*p*)

So, in the case of any ordinary joint-stock company, the deed of settlement of which declared that all cheques on its bankers were to be signed by three directors, and the directors drew cheques signed by less than three of them, it was held that this irregularity did not affect the right of the directors to be allowed as between themselves and the shareholders the sums drawn out, such sums having been *bonâ fide* applied for the purposes of the company. (*q*)

\*So, clauses relating to the mode of signing minutes of meetings, keeping registers, and making returns, so as to render them admissible in evidence without preliminary proof, are considered as directory only. (*r*)

These cases are not to be confounded with those in which shareholders and companies have been held estopped from taking advantage of the non-observance of formalities. Such cases do not turn upon whether the clauses prescribing the formalities are directory or imperative; but upon the very different question whether, supposing them to be imperative, the invalidity of what has been done informally can be insisted on by those who have always treated it as valid, and induced others to do the same. (*s*)

### SECTION III.—ON THE USUAL CLAUSES IN ARTICLES OF PARTNERSHIP.

Having now alluded to certain general rules which require to be borne in mind in considering the effect of special agreements between partners, it is proposed to notice shortly the provisions usually met with in partnership articles, and the interpretation which has been put upon them by the courts.

(*p*) See *Fountaine v. Carmarthen Rail. Co.* 5 Eq. 316; *The Royal British Bank v. Turquand*, 6 E. & B. 327, and 5 E. & B. 248; *Agar v. The Athenæum Life Assurance Society*, 3 C. B. N. S. 725. Compare *D'Arcy v. Tamar, &c.* Rail. Co. L. R. 2 Ex. 158.

(*q*) *Ex parte Bignold*, 22 Beav. 143.

Compare *Ex parte Agra and Masterman's Bank*, 6 Ch. 206; *Ex parte Birmingham Bank*, 3 Ch. 651.

(*r*) See, as to minutes of meetings, *ante*, p. 550, and as to registrars and returns, *ante*, pp. 139, 140.

(*s*) See *ante*, p. 128.

In framing articles of partnership, it should always be remembered that they are intended for the guidance of persons who are not lawyers; and that it is therefore unwise to insert only such provisions as are necessary to exclude the application of rules which apply where nothing to the contrary is said. The articles should be so drawn as to be a code of directions, to which the partners may refer as a guide in all their transactions, and upon which they may settle among themselves differences which may arise, without having recourse to courts of justice.

1. *The nature of the business.*—This should always be stated. Upon it depends the extent to which each partner is to be regarded as the implied agent of the firm in his dealings \*with strangers; and upon it also in a great measure depends the power of a majority of partners to act in opposition to the wishes of the minority. (t)

1. Nature of business.

\*831

2. *The time of the commencement of a partnership.*—*Prima facie*, articles of partnership, like other instruments, take effect from their date; and if they are executed on the day of their date, and contain no expression indicating when the partnership is to begin, it must be taken to commence on the day of the date of the articles, and parol evidence to show that this was not intended is not admissible. (u)

2. Commencement of the partnership.

It occasionally happens that it is expressly declared by the partnership articles that the partnership is to date from a specified time, either prior or subsequent to the day on which the articles are executed. The effects of such a declaration, as between the parties to the articles, and as between them on the one hand, and third persons on the other, are by no means the same. As between the parties themselves the time specified is that from which the accounts of profits and losses are to date: but as between those parties and third persons the time in question is of little if any importance; for an agreement that a partnership shall date from a time past does not enure to the benefit of creditors (x); and an agreement that it shall date from a time future does not prejudice them, if, in fact, the parties act as partners before such time arrives. (y)

Retrospective and prospective partnership.

(t) See *ante*, p. 598.

(u) *Williams v. Jones*, 5 B. & C. 108.

If the articles are not dated, parol evidence is admissible to show that they were not to take effect from the time of

their execution. See *Davis v. Jones*, 17 C. B. 625.

(x) *Vere v. Ashby*, 10 B. & C. 288.

(y) *Battley v. Lewis*, 1 Man. & Gr. 155.

It occasionally happens that an agreement for a partnership is drawn up and signed, but a more formal instrument is intended to be executed. If in a case of this sort the Formal contract to be drawn up. execution of the formal instrument is delayed, the commencement of the partnership is not necessarily delayed also. Whether it is or is not must depend on the terms of the preliminary agreement; for by that agreement the parties are bound, and its terms will regulate their rights and obligations *inter se*, so long as the more formal instrument is unexecuted. (z)

\*3. *The name or style of the firm*, should be expressed; \*832 and it should be declared that no partner shall enter into an engagement on behalf of the firm except in its name. Such an agreement is capable of being enforced (a); 3. The style of the firm. and it may be of use in determining, as between the partners, whether a given transaction is to be regarded as a partnership transaction or not.

4. *The duration of the partnership*.—If the time for which the partnership is to endure is not limited to a definite period, either expressly or by necessary implication, the 4. The duration of the partnership. partnership may be dissolved at the will of any partner. (b)<sup>1</sup> But it

(z) See *England v. Curling*, 8 Beav. 133.

(a) See *Marshall v. Colman*, 2 J. & W. 268.

(b) *Ante*, pp. 218-220.

<sup>1</sup>In a suit brought to recover damages for the breach of a contract to continue a partnership, the court was requested to charge the jury that "if they found that the defendant wrongfully dissolved and broke up the partnership, they were not confined, in estimating damages, to the rate of profits at the time of the dissolution but might consider and give damages for profits that would probably have been made by the higher prices, and might consider the present and probable future rate during the balance of the partnership, to which the court said: "Yes, I think that is a sound proposition; it requires some care. You are not to guess about this matter. If you can rationally see through this, that the profits would have been greater

in the future, and are greater at the present time than at the time of the dissolution, and you believe that the present increased profits, if such there would be, are likely to continue and increase, and you can satisfy yourselves of this in your own minds, then you have a right to look through the remainder of the time of the partnership, making a very careful estimate in regard to what the profits might probably be." Subsequently the defendant's counsel requested the court to charge "that the profits which might have been made are too speculative, vague and contingent, depending upon the many circumstances of fluctuation in prices, bad debts, etc., to form a basis of damages." The court responded: "I cannot charge that; you must judge for yourselves, applying those rules which I have enjoined, and that deliberation which the case requires:" *Held*, that the rule of damages established by the rulings was

must not be forgotten that a partnership entered into for a definite time is dissolved by the death or bankruptcy of any one of its members before that time has expired (*c*), and that it is therefore necessary to provide for these events in order to give effect to the agreement as to time.<sup>2</sup>

A partnership entered into for a certain time and continued after that time has expired, is a partnership at will. (*d*)

5. *The premium*.—The points to be attended to with reference to this, are, 1, when, to whom, and how it is to be paid; and, 2, whether the whole or any part of it is to be returned in any and what events. The law relating to this subject has been already noticed. (*e*)

erroneous, being of too speculative and conjectural character, and leaving the jury to make an estimate of the profits which would accrue during the stipulated term of partnership remaining, subsequent to the trial, from what in their view was probable on the subject, and without any data from which to estimate. *VanNess v. Fisher*, 5 Lans. 236.

(*c*) *Ante*, p. 230.

<sup>2</sup> A provision in the articles of co-partnership, for a continuance, notwithstanding the death of a member, is valid and may be enforced; but as it is contrary to general rule of law, it must be clearly proved and strictly followed. *Alexander v. Lewis*, 47 Tex. 481. See *ante*, p. 231, note.

Where under the partnership articles the children of one partner were to succeed to the share and interest of their father, in case of his death before the expiration of the partnership contract, and at his death being *sui juris* drew the amount monthly which their father was allowed to draw: *Held*, that this was an acceptance of the succession to all the interests and responsibilities of the deceased partner, and that the children were liable at the suit of a creditor of the firm. *Nave v. Sturges*, 5 Mo. App. 557.

Articles of co-partnership contained

the provision "that, in case of the death or bankruptcy of any of the said parties, in order to prevent any altercation with the heirs, executors, administrators, or assigns of the deceased or bankrupt, the shares of the profits, as well as capital, of the deceased or bankrupt, shall be paid by the survivors or solvents, agreeably to the yearly statements of the company's affairs prior to his death or bankruptcy:" *Held*, that this clause applied to real estate belonging to the firm, as well as to personal, and that, on the death of a partner in whom alone was the legal title to land, for the benefit of the firm, the whole beneficial estate therein survived to the surviving partners. *Robertson v. Miller*, 1 Brock. 466.

Where a partnership was formed between an individual, on the one part, and a pre-existing firm on the other part: *Held*, that a provision in the articles of partnership, that the firm should continue "until dissolved by and with the mutual consent of both parties," did not authorize the survivors to continue the partnership business after the death of one of the partners. *Egberts v. Wood*, 3 Paige, 517.

(*d*) *Featherstonhaugh v. Fenwick*, 17 Ves. 307, and *ante*, p. 219.

(*e*) *Ante*, p. 71, *et seq.*

6. *The capital and property of the firm.*—The articles should always carefully specify what is and what is not to be considered partnership property; particularly where <sup>6. The capital and property of the firm.</sup> one partner is, or is to be, solely entitled to what is to be used for the common purposes of all. If one partner is entitled to land which is to become partnership property, it is usual (in order to prevent a sale to a person for value without notice), to have that land conveyed or assigned to trustees for the firm; but, as between the partners themselves, all that is requisite is to declare in the articles that the land shall form part of the assets of the firm. It is also prudent to declare that, as between the real and personal representatives of any deceased partner, his share <sup>\*shall</sup> <sup>\*833</sup> be deemed personal estate. It should be declared that apprentice fees and other casual payments belong to the firm and form part of its profits.

A kind of property which is difficult to deal with, and which should always be made the subject of an express agreement, is the benefit accruing from an office or appointment <sup>Official appointments.</sup> obtained by one of the partners. For example, in the case of a firm of solicitors, one of them may be a clerk to some turnpike trust, or to a poor law board, or he may hold some other appointment yielding a salary. Care should always be taken to specify whether the salary is to belong solely to the partner holding the appointment, or whether it is to form part of the partnership assets (*f*); and if the latter, provision should be made for the payment of a sum by the partner holding the appointment in the event of the dissolution of the firm whilst the appointment continues. If the profits of the office are partnership assets, and the firm is dissolved whilst the office is held by one of its members, the court, in winding up the partnership will leave him in the enjoyment of the office, but charge him with its value in his account with the firm. (*g*)

When a partnership is formed for working some secret and unpatented invention, the articles should specify to whom <sup>Trade secrets, patents, &c.</sup> exclusively the right of working such invention shall belong in the event of dissolution. For if there be no agreement on the subject, all the parties will have a right to work it, in oppo-

(*f*) See *Collins v. Jackson*, 31 Beav. 645, noticed *ante*, p. 651, where profits arising from appointments of this sort were held to belong to the partnership,

although *prima facie* they do not.

(*g*) See *Smith v. Mules*, 9 Ha. 556; *Ambler v. Bolton*, 14 Eq. 427.

sition to each other, there being no ground upon which any of them can be prevented from so doing. If, however, it can be proved by the inventor that his secret was to be kept from his co-partners, or that they, if they discovered it, were not to make use of their discovery, they will not be allowed to violate the agreement into which they have entered, or the trust reposed in them; and the circumstance that the invention has not been patented will not be material. (*h*)

*Good-will* is a kind of property which ought  
 Good-will. \*834 also to be \*expressly provided for; but this is most conveniently done in connection with the dissolution clauses. (*i*)

The proportions in which the capital is to be contributed by the partners, and the proportions in which they are to be entitled to it when contributed, ought also to be carefully expressed. It by no means follows that the partners are to be entitled to the assets in the proportions in which they contribute to the capital. Indeed, if no express declaration upon the subject is made, the *primâ facie* inference is, that all the partners are entitled to share the assets (minus the capital) equally, although they may have contributed to the capital unequally. (*k*)

The capital should be expressed to be so much money; and if one of the partners is to contribute lands or goods instead of money, such lands or goods should have a value set upon them, and their value in money should be considered as his contribution. If this be not done, the articles and accounts and the proportions in which profits and losses are to be shared will be less perspicuous and free from doubt than would otherwise be the case; and the partner who contributes land will generally be inclined to look upon such land as his, and not as part of the common stock.

When the articles provide that each partner shall bring in so much capital, or do some other specified thing, the question sometimes arises how far the fulfilment by each of his obligations is a condition precedent to his right to call for fulfilment by the others of their obligations. The rules laid down in the well known note to *Pordage v. Cole* (*l*), must be applied to all such cases. These rules are as follows:

Capital should be money.  
 Rules as to conditions precedent.

“1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, *before* the thing which is the

(*h*) See *Morison v. Moore*, 4 H. & 241.

(*k*) *Ante*, pp. 676, 677.

(*i*) See as to this, *infra*, p. 859 *et seq.*

(*l*) 1 Wms. Saund. 320, *a*.

consideration of the money or other act is to be performed, an action may be brought for the money or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.

"2. When a day is appointed for the payment of money, &c., and the \*day is to happen *after* the thing which is the consideration of the money, \*835 &c., is to be performed, no action can be maintained for the money, &c., before performance.

"3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.

"4. But where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and the performance must be averred.

"5. Where two acts are to be done at the *same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay a sum of money on the *same day*, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

In conformity with these rules, it was held, in *Stavers v. Curling* (m), that the plaintiff who had covenanted to proceed on a whaling voyage, and to obey the instructions of the defendants, but who had not obeyed them, could nevertheless maintain an action against them for the share of the profits which they had covenanted to pay him, although they had only covenanted to pay him on the performance by him of his covenants.

Stavers v.  
Curling.

So in *Kemble v. Mills* (n), where two persons had agreed to become partners, and one of them was to bring in 2000*l.*, and do certain things, and the other was to bring in 5000*l.*, it was held that an action lay for non-payment of the 5000*l.*, although the plaintiff did not state that he had brought in his 2000*l.*, or had done any other of the acts which he had agreed to do.

Kemble v.  
Mills.

Capital is sometimes agreed to be brought in in the shape of good debts. Where, on the formation of a partnership, it was agreed that one of the partners should bring in 40,000*l.* of good debts, and that sum was owing to him by persons who continued customers of the firm after its formation, and became indebted to it, and who in time paid it 40,000*l.* and more, it was held that this sum had been brought in as agreed.

Bringing in so  
much in good  
debts.

(m) 3 Bing. N. C. 355.

(n) *Kemble v. Mills*, 9 Dowl. 446.

Compare *Marsden v. Moore*, 4 H. & N. 500.

\*836 For \*nothing having been said as to the accounts on which the payments were made, and each customer's account having been kept in such a way as to form one single continuous account, the 40,000*l.* was treated as having been paid in discharge of the earliest items in their respective accounts; or, in other words, in discharge of the debts owing to the partner who undertook to bring in that amount of good debts, and not in discharge of the subsequent debts contracted with the firm. (*o*)

In *Cook v. Benbow*, a father, who was in business, took his sons into partnership, and agreed to bring into the business all the capital, plant, and stock in trade then and usually employed by him in the business. In estimating the capital, the book debts due to the father were valued at twenty per cent. below their nominal amount, but they, in fact, realized more; and it was held that the surplus constituted part of the father's capital, and not part of the profits of the partnership. (*p*)

When a person is about to enter a firm, he sometimes requires a guarantee that its debts do not exceed a certain sum. If such a guarantee is given, and it turns out that the debts of the firm exceeded the sum mentioned at the time in question, the guarantor is liable to an action; and the amount of damages which the plaintiff is entitled to recover is the loss he has sustained in consequence of the excess of debts above the sum mentioned; but not the loss he may have suffered by having joined the firm. (*q*)

7. *Interest, allowances, &c.*—The allowance of interest on capital and on advances should be made the subject of special agreement. The interest should be made payable before the profits to be divided are ascertained, and the interest on advances should be made payable before interest on capital. (*r*)

Most articles of partnership contain a clause authorizing each partner to draw out of the partnership funds a certain sum per month for his own private purposes. Such a clause should provide for the repayment with interest of whatever may be drawn out in excess of the sum mentioned.

The articles should also specify what expenses are to be borne by

(*o*) *Toulmin v. Copland*, 2 Cl. & Fin. 681; S. C. 3 Y. C. Ex. 636.

(*q*) *Walker v. Broadhurst*, 8 Ex. 889.

(*p*) *Cook v. Benbow*, 3 DeG. J & Sm. 1.

(*r*) See, as to interest, when there is no agreement to allow it, *ante*, p. 786.

the firm; and particular notice should be taken of allowances of an unusual kind, but which the partners may intend shall be made, *e. g.*, an allowance for treating customers, for management, for rent, maintenance of servants, &c., &c. (s).<sup>1</sup>

8. *Conduct and powers of the partners.*—It is the practice to insert in partnership articles an express covenant by each partner to be true and just in all his dealings with the others. This, however, is always implied; and the clause in

Expenses to be charged to the firm.

8. Conduct and powers of partners.

(s) *Ante*, p. 779.

<sup>1</sup> A provision in a partnership contract, that each partner shall pay his own individual expenses, must be understood as intended to apply when the parties were at home, and not when traveling on the business of the concern. *Withers v. Withers*, 8 Pet. 255.

Where articles of co-partnership stipulated that the capital and profits should remain in the concern, each party being at liberty to draw from the joint funds so much only as was necessary for his private expenses: *Held*, that plate, furniture, carriages, &c., did not come within the provision, but that the expenses of the family and education of children did. *Stoughton v. Lynch*, 1 Johns. Ch. 467.

Where one entered into a co-partnership with his son-in-law, and it was agreed that the father-in-law should furnish a house for a shop, tools, etc., and a house for the defendant to live in, and that he "should be at no expense:" *Held*, that these words must be intended to mean expense for things connected with the business, and not family expenses. *Brown v. Haynes*, 6 Jones Eq. 49.

By an agreement to share profits, the active partner was to be allowed, on adjustment of accounts, "the actual expenses that may appertain to the goods themselves: the court allowed the expenses for taxes, advertising," and clerk-hire, caused in the trade in question, and in connection with that part of such partner's property employed

therein. *Foster v. Goddard*, 1 Black, 506.

A co-partnership was formed to work a mining interest in several lots of land owned by the partners; by the articles, each partner was to pay his proportion of the expenses, in the ratio of his interest in the respective lots; some parts of the partnership accounts were so kept that their apportionment was readily made; but a portion of them were so kept that the expense incurred on the respective lots could not be separated: *Held*, that in adjusting this portion of the accounts the entire expense of working all the lots must be apportioned among them respectively in the proportion of the value of the mineral raised from each, and then the partners must be charged in the ratio of their interests in each lot. *Levi v. Karrick*, 13 Iowa, 344.

Where the articles of co-partnership distinguished between the obligation of the parties to contribute for the expenses of repairs to machinery, or new machinery to supply the place of any worn out, and the obligation to contribute for the purchase of additions to the machinery: *Held*, that a new foundation for a new engine put in a mill in place of an old one discarded, built for it because the foundation of the old engine, if repaired, was not sufficient for the new engine, must be considered as an addition and not as repairs, under articles distinguishing additions from repairs. *Dunnell v. Henderson*, 23 N. J. Eq. 174.

question is of little use in a legal point of view, although it may serve to remind the partners of their mutual obligations to good faith. In a recent case, two partners covenanted that they respectively would be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings; and each bound himself to the other in the penal sum of 5000*l.* for the due performance of the covenants in the articles. One of the partners became greatly indebted to the firm in respect of receipts by him on its account. It was contended that the debt was a specialty debt by reason of the covenant above referred to; but it was held that the debt was only a specialty debt to the extent of 5000*l.*, the amount of the penalty in which each partner was bound to the other, and that the residue of the debt was a simple contract debt only. (*t*)

Hiring servants, &c.

It is useful to state who is to have the power of hiring and dismissing servants. (*u*)

The time and attention which the partners are to give to the affairs of the firm should be expressly mentioned;<sup>2</sup> especially if one of them is to be at liberty to give less of his time and attention than the others. Inattention to business by reason of illness is, however, no breach of an agreement to attend to it. (*x*)

Amount of attention to be given to affairs of the firm.

It is usual to insert in partnership articles a clause \*prohibiting any partner from doing certain things without previously obtaining the consent of the others; *e.g.*, becoming surety, releasing debts, speculating in the funds, drawing, accepting, or indorsing bills, otherwise than in the usual course of business, &c.,

Stipulations that one partner shall not do certain things without the consent of the others.

\*838 clause \*prohibiting any partner from doing certain things without previously obtaining the consent of the others; *e.g.*, becoming surety, releasing debts, speculating in the funds, drawing, accepting, or indorsing bills, otherwise than in the usual course of business, &c.,

If the number of partners exceeds two, the majority should be expressly entrusted with the power of deciding what shall be done as regards any matter in dispute between the partners, and relating to the business of the partnership, as defined by the articles. (*y*) It is difficult to lay down a general rule

Majority.

(*t*) *Powdrell v. Jones*, 2 Sm. & G. 305.

(*u*) See *ante*, p. 598.

<sup>2</sup>See *Leighton v. Hosner*, 39 Iowa, 594. A partner, who agrees to "take charge of the entire business, and exert his utmost attention and time" for it, must account for the ordinary profits of such business, or explain

the causes which have rendered it less productive. *Stidger v. Reynolds*, 10 Ohio, 351.

(*x*) *Boast v. Firth*, L. R. 4 C. P. 1; *Robinson v. Davison*, 6 Ex. 269.

(*y*) See as to the powers of a majority, *ante*, p. 598 *et seq.*, and *Falkland v. Cheney*, 5 Bro. P. C. 476, which turned on the wording of the articles.

for the determination of what is to be done if the partners are equally divided. Articles of partnership, as usually drawn, are silent upon this question; but if it were declared that in such a case matters should be left in *statu quo*, probably some little assistance would be given to the preservation of peace and good will.

9. *Partnership books*.—In order to prevent any disputes as to the custody of the partnership books, it is advisable to declare that they shall be kept at the office of the partnership, and that each partner shall have free access to them. A Court will restrain the removal or detention of the partnership books contrary to an express agreement entered into by the partners (z); and even in the absence of any special agreement, the Court would probably interfere, for it is an implied obligation on the part of every partner not to exclude his co-partners from access to the books of the firm. (a)

9. Custody of the partnership books.

10. *Accounts*.—The object of taking partnership accounts is two-fold, viz., 1. To show how the firm stands as regards strangers; and 2. To show how each partner stands towards the firm. The accounts, therefore, which the articles should require to be taken, should be such as will accomplish this two-fold object. The articles should consequently provide, not only for the keeping of proper books of account, and for \*the due entry therein of all receipts and payments, but \*839 also for the making up yearly of a general account, showing the then assets and liabilities of the firm, and what is due to each partner in respect of his capital and share of profits, or what is due from him to the firm, as the case may be.

10. Accounts to be kept and taken.

In order, moreover, to prevent accounts which have been once fairly taken and settled from being afterwards disputed, the articles usually declare that an account when signed shall be treated as conclusive; or not be opened except for some manifest error discovered within a given time. A provision to this effect is extremely useful, and should never be omitted; but however stringently it may be drawn, no account will be binding on any partner who may have been induced to sign it by false and fraudulent representations, or in ignorance of material circumstances dis-

Accounts agreed to not to be re-opened.

(z) See *Taylor v. Davis*, 3 Beav. 388, note; *Greatrex v. Greatrex*, 1 DeG. & Sm. 692.

(a) In *Greatrex v. Greatrex*, 1 DeG.

& Sm. 692, it does not appear whether any express agreement as to the custody of the books had been entered into or not.

honorably concealed from him by his co-partners. (b) Where, however, all parties act *bonâ fide* such clauses are operative; but the usual provision as to manifest errors applies only to errors in figures and obvious blunders, not to errors in judgment, *e.g.*, in treating as good, debts which ultimately turn out to be bad, or in omitting losses not known to have occurred. (c) All errors are manifest when discovered; but such clauses as those here alluded to are intended to be confined to oversights and blunders, so obvious as to admit of no difference of opinion.

Moreover, an account may be conclusive for one purpose, although not for another, *e.g.*, for the purpose of calculating the profits to be divided so long as the firm is unchanged, but not for calculating the total amount to be paid to a partner on his expulsion from the firm. (d)

So, from the fact that nothing is reckoned for good-will in taking annual accounts with a view to a division of profits, it does not follow that the good-will is not to be reckoned on a dissolution of the partnership by the death or retirement of a partner. (e) Nor does it follow that because profits and losses are annually divided equally, the losses on a final winding up are to be divided equally, without reference to the capitals of the partners. (f)

The most important and instructive case on this subject is *Coventry v. Barclay*. (g) There it was provided that accounts should be taken and signed yearly, and not be afterwards disputed, and that on the death of a partner the survivors should be at liberty to take his share at its value, according to the last annual account preceding his death. The partners were accustomed in their annual accounts to put a nominal value on their plant and stock in trade, and to carry over a portion of their profits to a separate account, in order to form a reserve fund to answer unforeseen losses. Shortly before the death of one of the partners, the others *bonâ fide* made up an annual account in the usual way, and sent him a copy of it, which he never signed, but never in any

(b) See *Oldaker v. Lavender*, 6 Sim. 239; *Blisset v. Daniel*, 10 Ha. 493.

(c) See *Ex parte Barber*, 5 Ch. 687; *Laing v. Campbell*, 36 Beav. 3, where, however, there were no articles.

(d) *Blisset v. Daniel*, 10 Ha. 493. Compare *Coventry v. Barclay*, *infra*,

note. (g)

(e) *Wade v. Jenkins*, 2 Giff. 509.

(f) *Wood v. Scoles*, 1 Ch. 369.

(g) 33 Beav. 1, and on appeal, 3 De G. J. & Sm. 320. See, also, *Ex parte Barber*, 5 Ch. 687.

way disapproved. It was held (both by Lord Romilly and Lord Westbury) that the executors of the deceased partner were bound by the nominal valuation of the stock, &c., but (by Lord Westbury, reversing the decision below) that they were entitled to a share of the surplus of the reserve fund after paying the losses, &c., to meet which it was created.

The accounts having, in this case, been taken *bonâ fide* and in the usual way, and no errors being suggested, the absence of the deceased partner's signature was treated as of no importance, for he could not properly have refused to sign them. (*h*)

Accounts  
not signed.

11. *Retiring*.—In the absence of a special provision enabling a partner to retire, there is no method by which he can do so without a general dissolution and winding up of the firm; unless, of course, some agreement can be made between all the partners at the time of retirement. Moreover, as has been seen already, a partnership which has been entered into for a definite time, cannot be dissolved at the will of any member. It is obviously, therefore, in many cases necessary to insert in the articles, a special clause enabling a partner to retire, and \*defining the terms on which, as between himself and co-  
partners, he is to be at liberty so to do. (*i*)

11. Retiring  
from the firm.

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If it is provided that a partner may sell his share, and no restrictions<sup>1</sup> are mentioned, he may sell to any one he likes, even to a pauper; and on giving his co-partners notice of his withdrawal from the firm, he will cease to be a member thereof as between himself and them; even although the purchaser from him does not come forward and take his place as a partner in the firm. (*k*)

Power to sell  
share.

It is sometimes declared that a partner who is desirous of retiring shall offer his share to his co-partners before selling it to any one else.<sup>2</sup>

Co-partners to  
have refusal of  
share.

(*h*) The same thing occurred in *Ex parte Barber*, 5 Ch. 687.

(*i*) As to the interest in the good-will where nothing is said about it, see *infra*, p. 860:

<sup>1</sup> A stipulation in articles of co-partnership that neither party shall, without the other's consent, sell or assign his interest in the co-partnership, or in any property thereof, restricts the *jus disponendi* only during the continuance of the co-partnership, and not after its dis-

solution and the appointment by the court of a receiver of the partnership property. *Noonan v. McNab*, 30 Wis. 277; *Noonan v. Orton*, 31 Wis. 265.

(*k*) *Jefferys v. Smith*, 3 Russ. 158, *ante*, p. 700.

<sup>2</sup> A provision in partnership articles that neither of the partners should sell or assign his interest without consulting the other partners, and giving them the preference, does not by implication authorize the introduction of a stranger

In *Homfray v. Fothergill* (1) the articles provided that the offer should be made first to the other partners collectively; and if they should decline, then to those desirous of collectively purchasing; and if none such, then to the partners individually. It was held that an offer by one partner to all the others was equivalent to an offer to all of them, and also to such of them as might be desirous of buying, and that one of them having declined to buy, the others

into the firm by one of the partners, on a refusal by the rest to purchase his share. *McGlensey v. Cox*, 5 Pa. Law J. Rep. 203.

The plaintiffs and defendants became partners in the manufacture of a patent medicine, with a written agreement that the firm should continue 10 years unless the plaintiffs desired to dissolve it sooner, by a notice for that purpose, and that upon dissolution the recipe should be sold to the highest bidder of the parties. The plaintiffs gave notice of a dissolution, and that the recipe, trade-mark, etc., would be sold at auction by B. at the Merchant's Exchange. The property was then sold to the plaintiffs, the defendants refusing to concur in the sale, or to bid: *Held*, that the agreement contemplated a friendly dissolution, and a sale at auction by mutual consent, and that the parties should bid therefor among themselves; but that no authority was given to either to fix the time or place of sale, or to select an agent to make it; and that the plaintiffs obtained no title by their purchase. *Comstock v. White*, 31 Barb. 301.

A provision in the articles that upon the death of either partner the property shall vest in the survivor, and that he shall become debtor to the deceased partner's representatives for its value, is valid. *Gaut v. Reed*, 24 Tex. 46.

N. being engaged in an insurance and real estate business, sold one-half his interest therein to R., and they entered into a written contract to carry on the business as partners, with a stipula-

tion that in case of a dissolution, "the party continuing the business" should pay "the retiring party" a certain sum. After the firm had carried on the business some years, the partnership was dissolved in consequence of a disagreement. At that time the real estate business of the firm had become small, but they were agents for seven insurance companies; several days before the dissolution, N., without the knowledge of R., wrote to each of said companies that he could no longer continue the partnership, and soliciting for himself the agency of such company; and he was made agent for five of them, one of the others ceasing to take new risks, and the other transferring its business to a third person. N. took from the late office of the firm all the books of the companies which had made him their agent, and of the one which had ceased to do new business, and thereafter transacted their business as the firm had formerly done, doing also some land business for a customer of the late firm; while R. transacted no insurance or real estate business after the dissolution. It does not appear that R. was ever solicited to aid N. in procuring the agencies of the companies previously represented by the firm, nor that he ever objected to such transfer: *Held*, to establish a retirement of R. from the firm and a continuance of the firm business by N., of whom R. was entitled to recover the sum named in the contract. *Read v. Nevitt*, 41 Wis. 348.

(1) 1 Eq. 567.

were at liberty to do so, although no fresh offer to sell to them had been made, and the retiring partner refused to make such offer.

In *Glassington v. Thwaites* (*m*), the articles provided that no share should be disposed of by any partner until one month after notice in writing under his hand had been given to the other proprietors at a monthly meeting. A partner desirous of selling his share wrote a notice to that effect in a book which was produced at monthly meetings, and which all the partners had at all times power to inspect. It was held that the notice so given was sufficient, even although the book was not seen by all the partners. As a general rule, however, notice should be given to each partner individually. (*n*)

How notice  
may be given.

Where two persons became partners, and agreed that in the case of the death of either, the other should buy his share, or if he declined so to do, then that the share of the deceased should be sold to any person who might choose to buy it, one of the partners died, and the survivor declined to buy his share, or to enter into partnership with any purchaser of it. Under these circumstances, the Court, at the suit of the executor of the deceased partner, decreed a sale of his share, and directed that if no *bonâ fide* sale could be effected, an account should be taken in order to ascertain the value of such share. No sale being effected, and the accounts having been taken, the surviving partner was decreed to pay the amount of the share of the deceased and the costs of the suit. (*o*)

Sale if offer is  
declined.

Featherston-  
haugh v.  
Turner.

Articles of partnership frequently contain a clause to the effect that in case a partner is desirous of retiring, he shall give so many months' notice to his co-partner, who shall have the option of purchasing the share of the retiring partner. If such a clause is acted on, and a partner notifies his desire to retire to his co-partner, and the latter declares his option to purchase the share of the retiring partner, a contract is thereby concluded between them, from which neither can depart without the consent of the other. (*p*) Consequently, the retiring partner cannot withdraw his notice and dissolve the partnership under some other clause in the deed. (*p*) Even if the co-partner who is to

Declaring  
option to  
purchase.

(*m*) *Coop. temp. Brougham*, 115.

(*n*) *Ib.*

(*o*) *Featherstonhaugh v. Turner*, 25

(*p*) See *Warder v. Stilwell*, 3 Jur. N. S. 9, V.-C. Stuart; *Homfray v. Fothergill*, *ante*, p. 841.

*Beav.* 382.

purchase the other's share infringes the partnership articles, the Court will not willingly interfere and dissolve the partnership; although, if the partner who is to retire conducts himself so as to prejudice the business and exclude the other, the Court will interpose for the protection of the latter; for otherwise the business to which he is shortly to be solely entitled may be entirely ruined. (*q*)

With respect to the exercise of a right of pre-emption, it must be borne in mind that if the right is to be exercised within a given time it cannot be exercised afterwards, unless the time has been enlarged by the parties themselves. Courts will not extend the time on the ground that it was accidentally allowed to slip by. (*r*)

\*843 \*Where an offer to sell was made to a person who became lunatic after it was made, but before the time for accepting it had expired; it was held that his committee was not entitled to an extension of such time, nor to a renewal of the offer. (*s*)

12. *Dissolving the firm.*—Where the articles expressly stipulate that it shall be lawful for either partner to dissolve the partnership upon the commission by the other of certain specifically forbidden acts, the partnership may of course be determined if either partner does these acts. But this clause, like any other, may be waived by mutual consent; and even if not waived, advantage cannot be taken of it to dissolve the partnership on the ground of the commission of any forbidden act, after the lapse of any considerable time since such act came to the knowledge of the partner seeking to avail himself of it. (*t*)

It is not unusual to provide for a dissolution or retirement in case a partner shall become insolvent. The word *insolvent*, unless controlled by context, means unable to pay debts, in the ordinary acceptance of that phrase. A person may therefore be insolvent, although his assets, if all turned into money, might enable him to pay his debts in full (*u*); and although

In case of insolvency.

(*q*) See *Warder v. Stilwell*, 3 Jur. N. S. 9.

(*r*) See, on this subject, *Brooke v. Garrod*, 2 DeG. & J. 62; *Lord Ranelagh v. Melton*, 2 Dr. & Sm. 278.

(*s*) *Rowlands v. Evans, and Williams v. Rowlands*, 30 Beav. 302.

(*t*) See *Anderson v. Anderson*, 25 Beav. 190, which must not be consid-

ered as an authority for the doctrine that the Court will not hold partners to their articles. The notice to dissolve in that case was given six months after the commission of the act complained of, and not on account of such act, but in consequence of other disputes.

(*u*) See *per Le Blanc, J.*, in *Bayly v. Schofield*, 1 M. & S. 338.

he has not been adjudicated bankrupt or compounded with his creditors. (*v*) But a person is not deemed insolvent merely because he keeps renewing a bill which he cannot conveniently meet. (*x*)

A clause enabling any partner to determine the partnership by giving notice to the others, may be acted on, although one of the firm has become insane; for the partner serving the \*notice is not bound to find understanding \*844 for him who is served. (*y*)

Giving notice where one partner is insane.

A notice once given cannot be withdrawn except by consent. (*z*)

Withdrawal of notice.

A notice to dissolve on a given day of the week, and a given day of the month, is bad if there is any mistake in either date; *e.g.*, a notice to dissolve on Monday the 9th is bad, if the 9th falls on a Friday. (*a*)

Informal notice.

In a case where it was provided that the dissolution should be by deed, it was held that a submission by deed of all matters in dispute between the partners, and an award under seal made upon that submission dissolving the partnership, had the effect of dissolving it, although nothing was said about dissolution in the submission. (*b*)

Dissolution to be by deed.

When power is given to retire or dissolve the firm, or to expel a partner from it, power should also be given to any partner to sign, in the name of himself and co-partners, a notice of dissolution for insertion in the "Gazette." (*c*)

Signing notices of dissolution.

13. *Expelling*.—In order that an objectionable partner may be summarily got rid of, clauses are sometimes inserted providing for expulsion in certain events. All such clauses are construed strictly, on account of the abuse which may be made of them, and of the hardship of expulsion; and the Court will never allow a partner to be expelled if he can show that his co-partners, though justified by the wording of the expulsion clause, have, in fact, taken advantage of it for base and unworthy purposes of their

13. Powers of expulsion.

(*v*) See *Parker v. Gossage*, 2 C. M. & R. 617, and *Biddlecombe v. Bond*, 4 A. & E. 332, in which it was held that "insolvent" had not the technical meaning of having taken the benefit of the acts for the relief of insolvent debtors.

(*x*) *Cutten v. Sanger*, 2 Y. & J. 459; and see *Anon.* 1 Camp. 492.

(*y*) *Robertson v. Lockie*, 15 Sim. 285.

(*z*) *Jones v. Lloyd*, 18 Eq. 265.

(*a*) *Watson v. Eales*, 23 Beav. 294.

(*b*) *Hutchinson v. Whitfield*, *Hayes* (Ir. Ex.), 78.

(*c*) See *Troughton v. Hunter*, 18 Beav. 470.

own, and contrary to that truth and honor which every partner has a right to demand on the part of his co-partners. In *Blisset v. Daniel*, set *v. Daniel* (*d*), the expulsion clause was as follows:—

“That it shall be lawful for the holders of two-thirds or more of the shares for the time being, from time to time to expel any partner, by giving to, or leaving for him, at his then last place of abode in England or Wales, a notice in writing under their hands of such expulsion, which, in such event, shall operate  
 \*845 from and at the time of giving or leaving such notice, \*and shall be in the following form, namely, ‘We do hereby give you notice that you are hereby expelled from the partnership carried on under the firm of *John Freeman and Copper Company*. Witness our hands this — day of —.’”

The power, therefore was in the most general terms; no reasons for its exercise were required to be given, no meetings or deliberations were declared to be necessary before serving the notice. The holders of two-thirds of the shares signed a notice in the form prescribed, and served it on the partner whom they desired to expel. They gave no reasons and relied upon the clause set out above. But it appeared that they desired to get rid of their co-partner, not because so to do was in any sense for the benefit of the firm in a mercantile point of view, but because he objected to the appointment of one of his co-partner's sons as co-manager with his father. It further appeared that the offended father had complained to the other partners behind the back of the expelled partner, and had prevailed upon them to sign the notice, intimating that either the expelled partner or himself must leave the firm. The expelling partners having resolved to exercise the power, induced the expelled partner to sign certain accounts, in order that he might be bound by them when expelled. Their intention to expel him was, however, concealed until after the accounts were signed; and the notice of expulsion, which gave him the first intimation of any design to get rid of him was not served until he had signed the accounts. Under these circumstances the Court declared that the notice of expulsion was void, and restored the expelled partner to his rights as a member of the firm.

Having regard to the principles acted upon in cases of this description, it is conceived that a power to expel for misconduct cannot be safely acted upon until the delinquent partner has had an opportunity of explaining his conduct. (*e*)

(*d*) *Blisset v. Daniel*, 10 Ha. 493.  
 See, also, *Wood v. Woad*, L. R. 9 Ex. 190.

(*e*) See the judgment in *Blissett v. Daniel*, and *Cooper v. Wandsworth, Board of Works*, 14 C. B. N. S. 180.

A power of expulsion cannot be exercised without the concurrence of *all* those whose concurrence may be required by the articles. (*f*)

All must con-  
cur.

\*A notice of expulsion under one clause, cannot, if invalid, operate as a notice of dissolution under some other clause. (*g*)

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Notice of ex-  
pulsion

In *Smith v. Mules* it was provided, in effect, that if a partner should do or omit to do certain things, the others should be at liberty to dissolve the partnership, by giving notice to the partner who should offend; and that upon giving such notice the partnership should cease and be dissolved in the same manner, and with the same consequences, as if it had been determined by the voluntary retirement of the offending partner. The firm consisted of three partners, A., B., and C., who was B.'s son. B. was guilty of conduct for which he might have been compelled to retire. A. gave B. and C. notice that he dissolved the partnership under the clause above referred to. C., however, had done nothing rendering it competent for A. to expel him. It was therefore decided: 1, that A. had no right to expel B. without C.'s concurrence; 2, that A. had no right to dissolve the firm, so far as C. was concerned; 3, that C. having adopted the notice after it was given, A. could not treat the partnership as continuing; and 4, that the dissolution actually brought about was not a dissolution provided for by the articles, and did not, therefore, entail the consequences of a dissolution under them. (*h*)

*Smith v. Mules.*

When a power of expulsion is given in the event of a partner omitting to do certain things, *e. g.*, entering in the partnership book all moneys he may receive on account of the partnership, the power will not, as a rule, be exercisable, unless the omission was a studied omission. (*i*)

Power to expel  
in case of omit-  
ting to do  
things.

As to power to expel in case a partner becomes insolvent, see *ante*, p. 843.

A power to expel contained in articles for a partnership for a term of years is not exercisable after the term has expired, although the partnership may have been continued on the old footing. (*k*)

(*f*) See *Smith v. Mules*, 9 Ha. 556.

(*h*) *Smith v. Mules*, 9 Ha. 256.

(*g*) See *Smith v. Mules*, 9 Ha. 556;  
*Hart v. Clarke*, 6 DeG. M. & G. 532, and  
*Clarke v. Hart*, 6 H. L. C. 633.

(*i*) See *Smith v. Mules*, 9 Ha. 556.

(*k*) *Clark v. Leach*, 32 Beav. 14 and  
1 DeG. J. & Sm. 409.

14. Valuation of shares. 847\* 14. *Valuation of shares*.—Having provided for the events \*upon which a general partnership is to cease, the next point is to specify the method in which its affairs are to be wholly or partially wound up.

Where the articles have prescribed no method of winding up, or where the method prescribed cannot be carried into effect, then, unless the partners can come to some agreement as to what is to be done, there must, as a general rule, be a conversion of all the partnership property into money; and this money, after payment of the partnership debts, must be divided amongst the partners in the shares in which they may be entitled to it. (*l*)

Agreements for fair division. An agreement that on a dissolution the partnership property shall be fairly and equally divided, after payment of its debts, has been held to mean that the property shall be sold, and that the money produced by the sale shall be divided after the debts have been paid. (*m*)

Methods of avoiding sale. In order to prevent the ruin consequent on a sale when a partnership happens to be dissolved, several devices are had recourse to. The simplest is to specify in the articles a sum at which the share of an outgoing or deceased partner may be taken by his co-partners. (*n*) But it is seldom possible to fix a sum beforehand, and consequently such a provision is not common. It is more usual to stipulate that the share shall be taken to be of the value appearing in the last-signed account, and be paid with the addition of subsequent profits, or with interest at a certain rate, in lieu of such profits. If a stipulation to this effect is made, and the accounts have been regularly taken and signed, or regularly taken but not signed (*o*), so that the shares of the partners appear from the accounts as intended, all parties must abide by the stipulation (*p*),<sup>1</sup> although difficulties may arise as to the true construc-

(*l*) See *Cook v. Collingridge*, Jac. 607; *Kershaw v. Matthews*, 2 Russ. 62; *Wilson v. Greenwood*, 1 Swanst. 482. That this rule is not to be rigorously applied, see *Pettyt v. Janeson*, 6 Madd. 146, and *Simmons v. Leonard*, 3 Ha. 581, noticed *infra*.

(*m*) *Rigden v. Pierce*, 6 Madd. 353; *Cook v. Collingridge*, Jac. 607.

(*n*) Effect was given to such a provi-

sion in *Essex v. Essex*, 20 Beav. 442.

(*o*) As in *Ex parte Barber*, 5 Ch. 687; *Coventry v. Barclay*, 3 DeG. J. & Sm. 320.

(*p*) *King v. Chuck*, 17 Beav. 325; *Gainsborough v. Stork*, Barn. 312; and the cases in the last note.

<sup>1</sup> By articles of partnership, M. and A. stipulated that at the end of three months after the death of either of

tion of \* the articles. (*q*) But if, as frequently happens, the \*848 accounts intended to be taken and signed have not been taken, or have been taken irregularly, so that the last-signed account is not so late a one as is contemplated by the articles, in such a case the account must be made up to the latest date at which it ought to have been made up, regard being had to the articles and the practice of the partners; and the share of the outgoing or deceased partner must be taken at its value, as the same appears by the account so taken.

Effect of not  
keeping ac-  
counts as  
agreed.

Thus in *Pettyt v. Janeson* (*r*), the articles provided that the partnership accounts should be taken every 25th of March, and that if either partner died during the continuance of the partnership, his interest should be regulated by the last yearly settlement, and what should then appear to be due to him should be paid to his executors, with five per cent. interest, instead of subsequent profits. For some time the partnership accounts were regularly settled every 25th of March; but afterwards they were made up very irregularly, and often not for sixteen or eighteen months. A partner died in February, 1813. The last account prior to his death was settled on the 5th of November, 1811. The executors insisted that as there had been no annual settlement, as contemplated by the articles, they were entitled to a share of the profits calculated to the time of their testator's death. The surviving partner, on the other hand, contended that all they were entitled to was the amount of their testator's share, as appearing by the account settled in November, 1811, with interest thereon. But the Vice-Chancellor observed, "that the articles had two plain intentions—that there should be an annual

*Pettyt v.  
Janeson.*

them, a valuation of all their partnership assets and property should be made according to the amount of capital invested; and that the survivor should have one year thereafter, to take and pay the value of such share to the legal representatives of the decedent. One partner (A.) died intestate: *Held*, that M. was entitled to specific performance of the contract, which of itself constituted an equitable conversion of the real estate, and that the proceeds must be divided among the intestate's next of kin. *Maddock v. Astbury*, 32 N. J.

Eq. 181.

(*q*) A provision that a share shall be paid for as the same stood at the time of the last account, means as it stood in the partnership books. See *Blisset v. Daniel*, 10 Ha. 493, p. 511; compare *Stewart v. Gladstone*, W. N. 1878, p. 82. See, as to clauses of this description, *Coventry v. Barclay*, *ante*, p. 840; *Ex parte Barber*, *ubi supra*; and *Browning v. Browning*, 31 Beav. 316, as to interest and subsequent drawings out.

(*r*) 6 Madd. 146.

settlement, and that the estate of a deceased partner should receive no profits for the fraction of the year since the last annual settlement. That the settlement of the 5th November, 1811, was to be considered as a settlement substituted by the agreement of the parties in the place of the settlement stipulated for in the \*849 \*articles. That if the testator had died on the 1st October, 1812, it could not have been contended that his estate was to take profits subsequent to the 5th November, 1811, being the last settlement within a year of the death; and if this were to be treated in that case as a settlement, within the spirit of the articles, against the testator's estate, it must be equally considered as a settlement for the testator's estate as a settlement on the 5th November, 1811, which bound each party to come to the next annual settlement on the 5th November, 1812. That the Court must act upon that which ought to have been done as if it had been done, and must declare the testator's estate entitled to a share in the profits up to the 5th November, 1812, being the day which ought to have been the last annual settlement before the testator's death."

The same principle was acted upon by V.-C. Wigram, in *Simmons v. Leonard* (s), although account having ever been taken between the parties, and the day mentioned in the articles for taking the account not being apparently considered of much importance, the account directed to be taken did not stop at the day at which the last account would have been taken if the articles had been acted on. In *Simmons v. Leonard*, the articles provided that a general account and rest should be taken every 31st of December, or on such other day as the partners should agree upon; and that if a partner died during the term his executors should receive payment of his share as ascertained at the last annual rest, with interest thereon, in lieu of subsequent profits; and that his executors should have no right to look into the partnership books. The provision relative to the annual settlement of an account was never acted upon at all. One of the partners died, and the Vice-Chancellor held that the primary object of all parties was, that the death of one of them should not cause a general dissolution and winding up; that this object might be attained, although no such account as was contemplated had been taken; that it was absolutely necessary to take an account of some sort, and to let the executors, therefore, look into the partnership books;

and that, having regard to the omission of \*the partners to settle any account at all, the only account which could be taken was a general account of what was due to the testator at the time of his death for his share of capital and profits. \*850

These cases not only afford good illustrations of the rule that in construing partnership articles regard must be had to the conduct of the partners, even where a circumstance has arisen of which the partners had no previous experience (*t*), but they also show that the rule that there must be a sale of the partnership property whenever there is a dissolution, unless the articles provide for some other method of dealing with it, and the provisions in the articles are capable of being rigorously carried out, must be taken with considerable qualification. (*u*)

It is not unusual to stipulate that the share of an outgoing or deceased partner shall be taken by the continuing or surviving partners at a valuation; and although as a rule specific performance of an agreement for sale at a valuation will not be decreed unless the valuation has been made (*x*); yet where persons enter into partnership upon certain terms, one of which is, that on a dissolution one partner shall take the share of another at a valuation, the Court will, on a dissolution under the articles, enforce such a stipulation, and if necessary itself ascertain the value of the share. (*y*) It has, however, been held, that an agreement for a sale at a price to be fixed by valuers, one to be appointed by the seller and the other by the purchaser, or in case the valuers differ, by an umpire, does not enable the Court to appoint an umpire if the valuers will not do so, and are yet themselves unable to fix a price. (*z*) Moreover, *Wilson v. Greenwood* (*a*), throws considerable doubt \*on the validity, in the event of a bankruptcy, of an agreement that the share of a bankrupt partner shall be taken at a valuation by his co-partners. \*851

(*t*) See, too, *Jackson v. Sedgwick*, 1 Swanst. 460; *Coventry v. Barclay* and *Ex parte Barber*, ante, note. (*o*)

(*u*) See, as to the rule referred to, ante, p. 847.

(*x*) See *Vickers v. Vickers*, 4 Eq. 529, a case between partners and the authorities there cited. The rule does not apply to a valuation of things which are accessories to the main purchase. See,

*Jackson v. Jackson*, 1 Sm. & G. 184.

(*y*) *Dinham v. Bradford*, 6 Ch. 519. See, as to contracts to sell at a fair valuation, as distinguished from a valuation to be made by particular individuals, *Fry on Spec. Perf.* 95.

(*z*) *Collins v. Collins*, 26 Beav. 306; and see *Vickers v. Vickers*, 4 Eq. 529.

(*a*) 1 Swanst. 471. See, also, *Whitmore v. Mason*, 2 J. & W. 204.

### 15. *Transmission of shares and introduction of new partners.*—

15. Introduction of new partner in lieu of a dead or retired partner.

It is a common provision in partnership articles that on the death of a partner his executors, or his son, or some other person, shall be entitled to take his place. The effect of any such provision must of course depend on its words; but speaking generally it may be said,—

1. That clauses of this kind, although they bind the surviving partners to let in the person nominated (*b*), do not bind him to come in, but give him an option whether he will do so or not. (*e*)

2. That before making up his mind he is entitled to make himself acquainted with the state of the partnership affairs, although he is not entitled to have its accounts formally taken. (*d*)

3. That if he is desirous of coming in, he must comply strictly with the terms upon which alone he is entitled to do so. (*e*)

4. That if he declines to come in, and there is no provision as to what is then to be done, the partnership must be dissolved and wound up in the usual way. (*f*)

As a general rule, and excluding cases of agency, an agreement between two persons cannot be enforced against either of them by a third person, even although such third person was intended to derive a benefit from the agreement. (*g*)

In a recent case it was attempted to apply this rule to an \*852 \*agreement between two partners, that on the death of one his widow should succeed him. One of the partners was dead; it was contended that his widow had no right to succeed. But it was held that the rule in question had no application to such a case; that the articles had created a valid trust in favor of the widow; and that

(*b*) In *Wainwright v. Waterman*, 1 Ves. J. 311, a person was declared entitled to be admitted, although those with whom that question rested were divided in opinion. But in *Milliken v. Milliken*, 8 Ir. Eq. 16, it was held that a person who is to be let in, provided he conducts himself to the satisfaction of the survivors, is without remedy if they will not admit him.

(*c*) *Pigott v. Bayley*, McCl. & Y. 569; *Madgwick v. Wimble*, 6 Beav. 495; *Downs v. Collins*, 6 Ha. 418; *Page v.*

*Cox*, 10 Ha. 163. See, too, *Pearce v. Chamberlain*, 2 Ves. S. 33.

(*d*) *Pigott v. Bayley*, McCl. & Y. 569.

(*e*) *Holland v. King*, 6 C. B. 727; *Brooke v. Garrod*, 3 K. & J. 608, and 2 DeG. & J. 62; *Milliken v. Milliken*, *supra*, note (*b*). See *Ex parte Marks*, 1 D. & Ch. 499.

(*f*) *Kershaw v. Matthews*, 2 Russ. 62; *Downs v. Collins*, 6 Ha. 418; *Madgwick v. Wimble*, 6 Beav. 495.

(*g*) See *Colyear v. The Countess of Mulgrave*, 2 Keen, 81.

she was entitled to come to the Court for a decree for the execution of such a trust. (*h*)

In a case where articles provided that in the event of the death of a partner during the term for which the partnership was intended to last, his share should go to his widow for life, and after her death to his children, and in default of children to his widow's executors, administrators, or assigns; it was held that the children of a partner who had died leaving a widow, did not take any vested interest in the partnership assets during her life. (*i*)

Cases of settled share.  
Balmain v. Shore.

In another case partnership articles provided that on the death of a partner the survivor should carry on the business for the benefit of himself and such person as the other should by will appoint, and, in default of appointment, for the benefit of his widow, or (if she should be dead) for the benefit of his children, and in default of children for the benefit of his executors or administrators; and that such person, or the said widow, children, executors, or administrators, should stand in the place of the deceased, and be entitled to the same share in, and have the same control over, the partnership trade and assets, as the deceased would himself have been entitled to if living. It was held that this was not, technically speaking, a power of appointment, and that consequently a partner could bequeath his share by a will which did not allude either to the power or to the partnership. (*k*)

Appointment of successor.  
Ponton v. Dunn.

When a person has been admitted into an existing firm, and no express agreement has been made as to his rights and liabilities, the inference is that as between themselves his position is the same as that of the other partners.<sup>1</sup> If they are bound by existing articles he will be bound by the same \*articles, if his conduct justifies the conclusion that he has \*853 assented to them; and if any special agreement is made with him, it will be regarded as incorporated with any previous agreement between the older partners, although so far as the two agree-

Position of incoming partner.

(*h*) Page v. Cox, 10 Ha. 163.

(*i*) Balmain v. Shore, 9 Ves. 500.

(*k*) Ponton v. Dunn, 1 R. & M. 402. See, also, Beamish v. Beamish, Ir. Rep. 4 Eq. 120, where a bequest of a share of residue was held not to amount to a nomination of a successor.

<sup>1</sup> Persons who succeed to the interest

of some of the members of a firm, and are recognized and treated as partners by the remaining original members, the latter continuing the business, in conjunction with them, under the original agreement, become members of the firm under the original articles. Meaher v. Cox, 37 Ala. 201; S. C. Ala. Sel. Cas. 156.

ments may be inconsistent, the latest will prevail. (*l*) If, indeed, the incoming partner has no knowledge of any prior agreement between the others, he cannot be bound thereby (*m*); for nothing that he can have done can be regarded, under these circumstances, as evidence of any assent thereto on his part; and it is upon such presumed assent that the rule in question is founded.

16. *Annuities to widows*.—Sometimes it is agreed that if a partner dies the survivor shall pay an annuity, or a share of the profits, to his widow. There is now no difficulty in framing a clause of this sort without making the widow a partner or a quasi-partner by virtue of her participation in profits (*n*); and after her husband's death she can enforce payment of the provision intended for her. (*o*)

If the annuity is made payable out of the profits, and the business is carried on and no profits are made, no annuity will be payable. So, if the surviving partner has an option to pay either an annuity or a share of the profits and there should be no profits, he will not be bound to pay anything; for, *ex hypothesi*, it is competent for him to elect to pay out of the profits, and his right to make this election in no way depends on their amount. (*p*) Moreover, in construing a provision giving a widow of a deceased partner a share of the profits, the partnership which, strictly speaking, determined when her husband died, is regarded as continuing, and the profits, which she is to share must be ascertained on that principle. They ought not to be calculated as if the returns yielded by the new business had not to be applied in liquidating the demands on the old firm. (*q*)

In *Holyland v. De Mendez* (*r*) a continuing partner gave a bond conditioned to be void on payment of an annuity, or on being without his own default dispossessed of the partnership property assigned to him. It was held that the annuity did not cease on the bankruptcy of the continuing partner; dispossession by his assignees not being such a dispossession as was contemplated in the bond.

(*l*) See *Austen v. Boys*, 24 Beav. 598, p. 852.  
and 2 DeG. & J. 626.

(*m*) Ibid.

(*n*) See, as to this, *ante*, pp. 43, 44.

(*o*) See *Page v. Cox*, 10 Ha. 163, *ante*,

(*p*) *Ex parte Harper*, 1 DeG. & J. 180.

(*q*) Ibid.

(*r*) 3 Mer. 184.

An agreement to pay an annuity out of profits involves an obligation not willfully to prevent the earning of profits; and if, therefore, the person who has to pay the annuity willfully ceases to carry on business he becomes liable to an action for damages. (s) In order, however, to provide as far as possible against any attempt to defeat the annuity by discontinuing the business, it is desirable that the partner continuing the business should covenant not only that he will carry on the business and pay the annuity, but that he will not transfer the business, or take in any fresh partner, without procuring from the transferee or new partner a similar covenant on his part.

Effect of discontinuing business.

17. *Prohibitions against carrying on business.*<sup>1</sup>—A subject upon which it is always desirable to make some express agreement is the extent to which a retiring partner shall be restrained from commencing business on his own account, and in opposition to the continuing partner. In the absence of any agreement upon the subject, a retiring partner is as much at liberty to set up for himself, in opposition to the firm he has quitted, as he would be if he had never belonged to it; and on a general dissolution of partnership, all the partners are at liberty to commence business in opposition to each other, as freely as if they had never been partners, unless they have entered into some agreement not to do so. A dissolution *per se* obliges no partner to retire from business, or to refrain from seeking a livelihood in the manner in which he has been accustomed so to do, and in the neighborhood where he is known. (t)<sup>2</sup>

17. Prohibitions against continuing in business.

Rule where there is no prohibition.

Further, it is held, although it is certainly an extraordinary doctrine, that if a person sells the good-will of his trade or \*business, that does not disentitle him \*855

Carrying on business after selling it.

(s) *Macintyre v. Belcher*, 14 C. B. N. S. 654; *Telegraph Dispatch Co. v. McLean*, 8 Ch. 658. Compare *Rhodes v. Forwood*, 1 App. Ca. 256, and see *ante*, p. 378.

<sup>1</sup> A clause in a co-partnership agreement, wherein each partner agrees not to transact on his individual account, within twenty miles of the village in which such partnership is to do business, the kind of business for the transaction of which it is created, is unobjectionable. *Fairbank v. Leary*, 40 Wis. 637.

(t) See *Farr v. Pearce*, 3 Madd. 78; *Davies v. Hodgson*, 25 Beav. 177.

<sup>2</sup> On the dissolution of a partnership whose business is the publication of a periodical paper, the good-will of the paper is assets, but one partner will not be enjoined from carrying on the same business (in the absence of any covenant or restriction), unless he does it in a way which would be an infringement, according to the analogies of the law of trade-marks. *Dayton v. Wilkes*, 17 How. Pr. 510. See *post*, *Goodwill*.

from recommencing a similar trade or business in the immediate vicinity of the place where the old one was carried on; (*u*)<sup>1</sup> and, therefore, if it is agreed that a partnership shall be dissolved, and that one partner shall buy the other out, and this agreement is carried into effect, the retiring partner will nevertheless be at liberty to recommence business in the old line in the old neighborhood (*x*); and he may advertise the fact. (*y*) But he must not specially solicit business from the old customers or correspondents of the firm (*z*);<sup>2</sup> and he must not hold himself out as continuing *the* business which he has sold, and must not therefore carry it on in the name in which it was carried on before he sold it. (*a*)<sup>3</sup> At the same time, if that name happens to be his own, it is by no means clear that he could be restrained from carrying on business in that name. (*b*)

The above propositions are well illustrated by the important case of *Churton v. Douglas*. (*c*) There two of the plaintiffs, *Churton v. Douglas*, and the defendant, whose name was *John Douglas*, carried on business in partnership under the firm of *John Douglas &*

(*u*) *Crutwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Madd. 198; *Kennedy v. Lee*, 3 Mer. 455; *Shackle v. Baker*, 14 Ves. 468. See, too, *Davies v. Hodgson*, 25 Beav. 177, and *Churton v. Douglas*, Johns. 174. In *Johnson v. Helleley*, 34 Beav. 63, notice of this right was directed by the Court to be given in the particulars of the sale of the goodwill.

<sup>1</sup> *White v. Jones*, 1 Robt. N. Y. 321.

(*x*) See *Kennedy v. Lee*, 3 Mer. 452; *Mellersh v. Keen*, 27 Beav. 236; *Bradbury v. Dickens*, ib. 53; *Smith v. Everett*, ib. 446, and the next note.

(*y*) *Hookham v. Pottage*, 8 Ch. 91; *Labouchere v. Dawson*, 13 Eq. 322, and see *Crutwell v. Lye*, 17 Ves. 335.

(*z*) *Ib.*

<sup>2</sup> See, *post*, 857, note.

(*a*) *Churton v. Douglas*, Johns. 174; *Hookham v. Pottage*, 8 Ch. 91, where the defendant described himself as P. from H. & P., the old firm, but in a way calculated to deceive.

<sup>3</sup> On the retirement of a partner from a firm, his co-partners continued the business at the old place, and the retir-

ing partner embarked in the same line of business, and on the same side of the same street, and within about fifty feet from the old store, and put up a sign bearing in the first line his own name, in the second line the words, "of the late firm of;" and in the third, the name of the old firm; the second line being in letters of good size, yet but little more than a third the height of the letters in the third line: *Held*, that an injunction should issue to restrain this use of the firm name. *Smith v. Cooper*, 5 Abb. New Cas. 274.

Abraham Bining Clark, who had been a partner in the firm of A. Bining & Co., usually writing his name as Abm. B. Clark, continued a similar business on his own account, after the dissolution of that firm, and put up his name as A. Bining Clark, successor to A. Bining & Co.: *Held*, that he might be restrained by injunction from the use of such a style. *Bining v. Clark*, 10 Abb. Pr. N. S. 264.

(*b*) See *ib.*

(*c*) Johns. 174.

*Co.*, as stuff merchants at Bradford. The defendant retired from the firm; a new partner was taken in; and the defendant assigned to his old partners and their new partner (being the plaintiffs) all his, the defendant's, share and interest in the old firm, and in the good-will thereof. The plaintiffs continued to carry on the old business under a new name, with the addition *late John Douglas & Co.* The defendant formed a new partnership with three persons who had been in the employ of the \*old firm, and \*856 whom he had enticed to leave the service of its successors and to join him; and he and his new partners commenced business as stuff merchants at Bradford, in a house adjoining the place of business of the old firm; and they did so in the name of *John Douglas & Co.* They further affixed that name to the house they had taken, and sent circulars to the old customers of the old firm, so as to lead them to suppose that the business of that firm was being continued by defendant and his new partners. On a bill filed by the plaintiffs against the defendant it was held, (1), that he was entitled to carry on, by himself or in partnership with others, the kind of business previously carried on by him with his late partners; and, (2), that he was entitled so to do in the immediate neighborhood of the place where he and his late partners previously carried on their business. But it was also held, (3), that the plaintiffs alone had the right to carry on the business previously carried on by *John Douglas & Co.*; (4), that the plaintiffs had the right to represent themselves as the successors of that firm; (5), that the defendant had no right to represent himself as its successor; (6), that he could not acquire such a right by taking other persons into partnership with him; and, (7), that although his name was John Douglas, he had not, either alone or in partnership with others, the right to carry on the old kind of business, in the old place, under the old name of *John Douglas & Co.* An injunction was granted accordingly to restrain the defendant from carrying on the business of a stuff merchant, at or in the immediate neighborhood of Bradford, either alone or in partnership, under the style *John Douglas & Co.*, or in any other manner holding out that he was carrying on the business of a stuff merchant in continuation of, or in succession to, the business carried on by the late firm of *John Douglas & Co.*

An agreement by a partner that he will not carry on business in opposition to his late co-partners, may be implied from some other agreement into which he

Implied agreement not to continue in business.

and they have entered. Thus where two persons became partners as brewers for eleven years, and it was provided in the articles that either of the parties, on giving six months' notice to the other, should be at liberty to *quit the trade and mystery* \*857 *of a brewer*, and that \*the other should be at liberty to continue the trade on his own account; it was held that one of the partners who had retired from the firm after giving notice to the other was not at liberty to continue in the trade at all. (*d*)

Again, where on the retirement of a partner, it was left to an arbitrator to determine what the continuing partner should pay for the good-will, and the arbitrator fixed a sum upon the understanding that the retiring partner would not commence a new business in the same street in which the old one was carried on; an injunction was granted restraining the retiring partner from carrying on business in that street, although the award itself was silent upon the point. (*e*)

So in *Churton v. Douglas* (*f*), the sale of the good-will was alone sufficient to preclude the seller from setting up business in the name of the old firm, as if he, and not the purchasers, were continuing the business sold.<sup>1</sup>

An agreement by a retiring partner not to commence business in opposition to his late partners, will, whether express or implied, be upheld and enforced, if the restriction imposed upon him is not unreasonable, having regard

(*d*) *Cooper v. Watson*, 3 Dougl. 413; *S. C. sub nomine*, *Cooper v. Watlington*, 2 Chitty, 451.

(*e*) *Harrison v. Gardner*, 2 Madd. 198.

(*f*) *Johns*, 174, *ante*, p. 855.

<sup>1</sup> But such sale is not sufficient to preclude the seller from setting up business in his own name. *White v. Jones*, 1 Robt. (N. Y.) 321.

A transfer, by a retiring partner to the other, of "the business connections and patronage belonging to the firm," may be deemed to include the good-will of the concern. *Kellogg v. Totten* 16 Abb. Pr. 35.

The good will of a hotel is not transferred by the sale of the furniture and

personal property, but the same pertain to, and could not be sold separately from the lease. *Mitchell v. Read*, 19 Hun, 418. *§ 444. 556*

One partner's share in the good will of the business of the firm is not a subject of separate sale. The good will of the business is invisible, when one of several partners retires from the firm, the good will remains, as an entirety with the continuing partners (subject to any right of the retiring partner to be compensated). Hence a court of equity will not enforce, nor enjoin proceedings at law upon, an agreement for a sale of one-fourth part of a good will. *Cassidy v. Metcalf*, 1 Mo. App. 593.

to the nature of the partnership business. (g)<sup>2</sup> Thus in *Williams*

(g) See, generally, as to covenants not to carry on business, *Mitchell v. Reynolds*, 1 Smith's L. C.; also the useful table appended to *Avery v. Langford*, Kay, 663; and *Allsopp v. Wheatcroft*, 15 Eq. 59. Distances are measured as the crow flies, *Duignan v. Walker*, Johns. 446; *Mouflet v. Cole*, L. R. 7 Ex. 70, and 8 Ex. 32, and the cases there cited. As to infringements by supplying goods within the distance, see *Clark v. Watkins*, 1 N. R. 342, L. J.; *Turner v. Evans*, 2 E. & B. 512, and *Brampton v. Beddoes*, 13 C. B. N. S. 538. As to the construction of covenants by agents not to carry on business to the detriment of their principals, compare *King v. Hansell*, 5 H. & N. 106, with *Mumford v. Gething*, 7 C. B. N. S. 305; and see *Turner v. Major*, 3 Giff. 442.

<sup>2</sup>See *Angier v. Webber*, 14 Allen, 211; *Shearman v. Hart*, 14 Abb. Pr. 358; *Butler v. Barleson*, 16 Vt. 176; *Ropes v. Upton*, 125 Mass. 258.

Partners dissolved their partnership, and the retiring member agree not to be concerned in any way in the kind of business carried on by the firm, for five years within the city where their business was established, nor interfere with any agency already established, nor establish any similar agency, that might interfere with the business of the firm, as before carried on, whether in said city, or elsewhere: *Held*, that so far as this covenant restrained the retiring member from engaging, within said city, in the business carried on by the firm, for a limited time, it was not in general restraint of trade, and therefore legal and proper, and that the remainder was a general restraint of trade, and therefore void. *Thomas v. Miles*, 3 Ohio St. 274.

Where partners, before dissolution, sold their stock of goods and the "good will" of their business, and stipulated

in the contract of sale, that they, or either of them, would not again enter into the same business in that locality: *Held*, that either, or both of them, were liable for a breach thereof by either one of them after dissolution. *Stark v. Noble*, 24 Iowa, 71.

Upon the sale of a business and good-will, it was agreed that the purchaser should be at liberty to use the name or style of the vendors for a period of two years. After the expiration of the two years the vendors recommenced business under a similar name or style to that under which they had carried on the business under which they had sold, and also solicited their former customers: *Held*, that they must be restrained from soliciting or in any way endeavoring to obtain the custom of their former customers. *Semble*, that they might also be restrained from dealing with their former customers. *Genese v. Cooper*, 22 Alb. Law Jour. 170.

N. & C. purchased the grain elevator of H., with the good-will pertaining thereto, and H. at the same time agreed not to engage in the grain business in the same place. Subsequently, N. & H. and another formed a co-partnership for the prosecution of the same business for one year: *Held*, that the formation of of partnership was inconsistent with the prior undertaking of H., and that, at the expiration of the partnership, he was absolved therefrom. *Norris v. Howard*, 41 Iowa, 508.

The plaintiff and defendant being co-partners, the latter on January 24, 1876, sold his interest to the former, taking his notes for \$4,000, payable at various times through a period of more than three years, and transferred the good-will of the business to the plaintiff, and agreed not to engage in it himself at B. for the term of 10 years from date. "This last agreement," (repeating it),

*v. Williams* (*h*), the defendant, who had been in partnership with the plaintiffs, in running coaches between Reading and London, sold his share in the business to them, and covenanted not to run any coach between Reading and London, or so as to injure the business of the plaintiffs; and this covenant was enforced in \*858 \*equity. So, in *Tallis v. Tallis* (*i*) the Court of Queen's

Bench upheld a covenant entered into by a retiring member of a firm of booksellers not to carry on the canvassing trade in London, nor within 150 miles of the General Post-Office, nor in nor within fifty miles of Dublin or Edinburgh, nor in any town in Great Britain or Ireland in which the continuing partner or his successors might at the time have an establishment.

An agreement entered into when a partnership is formed, to the effect that a retiring partner shall not carry on the business carried on by the firm, cannot be invalid for want of consideration. (*k*)

An agreement with a bankrupt to take his son into partnership, and to employ the bankrupt, is a sufficient consideration for an agreement by him not to carry on business in competition with the firm. (*l*)

In framing articles of partnership between solicitors, provision should always be made respecting the deeds and documents in their possession, but belonging to their clients.

Solicitors'  
papers, &c.

It need hardly be observed that no agreement which the solicitors may make between themselves, will prejudice their clients. Subject to any question of lien, the clients are entitled to have their deeds and documents, and all drafts and copies thereof, paid for by them, delivered up on request. (*m*) They have, moreover, a right to the joint assistance of all the members of the firm employed by them; and although, if the firm is dissolved, a client can-

"to be binding on me (defendant) only in case the \$4,000, which is the consideration hereof, is paid according to the said H.'s agreement to pay the same and at the time agreed upon." Nearly three years thereafter, the plaintiff having paid at maturity all of his notes except two, which had not matured, brought this action for the violation of the defendant's agreement not to engage in the business: *Held*, that the payment of the whole \$4,000 was not a

condition precedent to its maintenance. *Hunt v. Thibbets*, 70 Me. 221.

(*h*) 2 Swanst. 253: See, too, *Harrison v. Gardner*, 2 Madd. 198; *Whittaker v. Howe*, 3 Beav. 383.

(*i*) 1 E. & B. 391. See, too, *Atkins v. Kinnear*, 4 Ex. 776; *Reynolds v. Bridge*, 6 E. & B. 528.

(*k*) *Per* Lord Cranworth, in *Austen v. Boys*, 2 DeG. & J. 626.

(*l*) *Clarkson v. Edge*, 33 Beav. 227.

(*m*) *Ex parte Horsfall*, 7 B. & C. 523.

not insist that the partners shall continue to act as his solicitors, it is clear that they cannot, without his consent, turn him over to one of themselves (*n*); nor act against him as if he had never been a client. (*o*) The dissolution operates as a discharge of the client by the solicitors; and the client is thereupon entitled, subject to any question of lien, to have his deeds and papers delivered up to him. (*p*)

\*But, as between the solicitors themselves, it is competent for them to agree that, if they dissolve partnership, the clients of the old firm, and all their deeds and papers, shall be divided amongst the partners, or belong solely to the partner who continues to carry on the business of the firm; and such an agreement will be enforced. (*q*) If no such agreement is come to, each partner may, after dissolution, do his best to induce the old clients to continue him as their sole solicitor. 859\*

18. *Good-will*.—In connection with the subject considered under the last head it is necessary to allude to the good-will of a trade or business. 18. Good-will.

The term good-will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good-will has a marketable value, whether the business is that of a professional man or of any other person. (*r*) But it is plain that good-will has no meaning except in connection with a continuing business (*s*); and the value of the good-will of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business has been previously carried on. <sup>Nature of good-will.</sup>

When a partnership is dissolved, the question arises, What is to be done with its good-will? Now it has just been seen that there

(*n*) *Cook v. Rhodes*, 19 Ves. 272, note.

(*o*) *Cholmondeley v. Clinton*, 19 Ves. 261.

(*p*) *Griffiths v. Griffiths*, 2 Ha. 587; *Colegrave v. Manley*, T. & R. 400; and see *Vaughan v. Vanderstegen*, 2 Drew. 409.

(*q*) *Whittaker v. Howe*, 3 Beav. 383.

See, however, *Davidson v. Napier*, 1 Sim. 297.

(*r*) Good-will is property within the meaning of the stamp acts, *Potter v. The Commissioner of the Inland Revenue*, 11 Ex. 147.

(*s*) See, as to a legacy of good-will, apart from any share in a business, *Robertson v. Quaddington*, 23 Beav. 529.

is no obligation on the part of any of the partners to retire from business merely because the partnership between them is dissolved; and that even on the sale of good-will, the vendors are at liberty to continue to carry on business on their own account. It obviously follows, that the good-will of a valuable partnership business may be practically worthless, at least to any one except a former partner desiring to continue the business of the firm. (t) It is only so far as good-will has a saleable value that it can be regarded as an asset of any partnership; and the good-will of a business is frequently of no value at all, except in connection with the place of business. This, however, is by no means always the case. The value of the good-will of a newspaper, for example, attaches to its name, and is scarcely, if at all, dependent on the place of publication.

The saleable value of the good-will of a partnership business whatever that value may be, must be considered as belonging to the firm, unless there is some agreement to the contrary, and it follows from this—

1. That if a firm is dissolved, and there is no agreement to the contrary, the good-will must be sold for the benefit of all the partners, if any of them insist on such sale (u);<sup>1</sup>

(t) See *Davies v. Hodgson*, 25 Beav. 177, where the good-will was treated as valueless on this very ground.

(u) *Bradbury v. Dickens*, 27 Beav. 53, and the cases cited *infra*.

<sup>1</sup> The good-will of a partnership is an important and valuable interest, which the law recognizes and will protect. *Williams v. Wilson*, 4 Sandf. Ch. 405; *Holden v. McMakin*, 1 Pa. Sel. Cas. 270; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68. And it is regarded in equity as part of the assets of a firm. *Bining v. Clark*, 10 Abb. Pr. N. S. 264.

When a partnership is dissolved, the good-will is a part of the assets of the firm, and the court may order it sold or disposed of in such manner as may be deemed most advantageous to the partners, and the court may permit a partner to retain it upon payment of the full value thereof to his co-partner.

*Shepherd v. Boggs*, 2 N. W. Rep. N. S. 370; *S. C.* 9 Neb. 258.

The good-will may be sold. *Williams v. Wilson*, 4 Sandf. Ch. 405; *Holden v. McMakin*, 1 Pa. Sel. Cas. 270; and where, after dissolution, continuing partners refuse to take it at a valuation, a court cannot compel them so to do, and it must be disposed of like other partnership effects. *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68.

But the sale and assignment of a lease of a bakery, with the tools, fixtures, furniture, etc., etc., together with the good-will of the business of baking then or theretofore carried on by the vendor, with a covenant not to carry on the business in the same city himself, does not confer on the purchaser the right to use the name of the vendor in the conduct of the business at the same place, nor to designate or describe the bakery (by signs placed there-

2. That, so far as is possible, having regard to the right of every partner to carry on business himself, the Court will, on a dissolution, interfere to protect and preserve the good-will until it can be sold (x);

3. That if a partner has himself obtained the benefit of the good-will, he can be compelled to account for its value, *i. e.*, for what it would have sold for, he being himself at liberty to compete in business with the purchaser. (y)<sup>2</sup>

In the event of dissolution by death, it has been said that the good-will survives, and there is a clear decision to this effect. (z) But this is not in accordance with modern authorities; <sup>Good-will in cases of death.</sup> they are wholly opposed to the notion that the value of the good-will, as such, belongs to the survivor. (a)<sup>3</sup> It \*undoubt- \*861 edly may happen that the survivor may obtain the benefit of the good-will without paying for it; for he is at liberty (unless restrained by agreement) to carry on business on his own account (b),

on or otherwise) by the name of such vendor. *Howe v. Searing*, 6 Bosw. 354.

To preserve it, a receiver may be appointed to carry on the firm business until a sale can be effected. *Marten v. VanShaack*, 4 Paige, 479.

And an injunction will lie to restrain one person from assuming the name of another's newspaper to impose upon the public and to supplant the latter person in the good-will of his paper. *Bell v. Locke*, 3 Paige Ch. 75.

And after dissolution a partner may be enjoined from appropriating the good will to the exclusion of the other partners. *Bininger v. Clark*, 10 Abb. Pr. N. S. 264; and even after a receiver has been appointed for the firm, or after it has made an assignment in bankruptcy, one partner may restrain another one from a wrongful attempt to appropriate the good-will and name of the former firm. *Bininger v. Clark*, 10 Abb. Pr. N. S. 264.

A person, forming a co-partnership with another, having agreed to leave at the end of the term, cannot, on retiring claim an interest in the good-will of the business, and in accounting with his

partner, who continues at the same place, have an allowance for such good will. *Van Dyke v. Jackson*, 1 E. D. Smith, 419.

(x) See *Turner v. Mayor*, 3 Giff. 442, where, however, there was an express agreement for the sale of the good-will. In *Lewis v. Langdon*, 7 Sim. 425, the V.-C. Shadwell seemed to think that a surviving partner was under no obligation to preserve the good-will. But his opinion was probably influenced by *Hammond v. Douglas*, 5 Ves. 539, which was not then overruled.

(y) *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, *ib.* 236, and 28 Beav. 453.

<sup>2</sup> See *post*, p. 801, note.

(z) *Hammond v. Douglas*, 5 Ves. 539.

(a) *Wedderburn v. Wedderburn*, 22 Beav. 104; *Smith v. Everett*, 27 Beav. 446, and *Mellersh v. Keen*, *ib.* 236, and 28 Beav. 453. See, also, *Giblett v. Read*, 9 Mod. 459, a case of a newspaper.

<sup>3</sup> *Dougherty v. VanNostrand*, 1 Hoff. Ch. 68. *Holden v. McMakin*, 1 Par. Sel. Cas. 270. See 3 Kent Com. 64.

(b) *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 25 Beav. 177.

and possibly in the name of the late firm. (c)<sup>1</sup> Under these circumstances, if, on the death of a partner, the good-will is put up for sale, it will produce nothing if it is known that the surviving partner will exercise his rights. He will therefore acquire all the benefit of the good-will; but he does not acquire it by survivorship, as something belonging to him exclusively, and with which the executors of the deceased partner have no concern; for if he did, he might sell the good-will for his own benefit, and this he cannot do. (d) When, therefore, it is said that on the death of one partner, the good-will of the firm survives to the other, what is meant is, that the survivor is entitled to all the advantages incidental to his former connection with the firm, and that he is under no obligation, in order to render those advantages saleable, to retire from business himself. (e)

(c) See, as to this, *infra*, note (i).

<sup>1</sup> A surviving partner is not entitled, without consent of the representatives of the deceased partner, to use the firm name in continuing the business. Either the partnership name perishes with the firm itself, and neither the representative nor the survivor is entitled to use it; or it is an interest held in common after the death of one partner, possessed legally by the survivor, but held for mutual benefit. *Fenn v. Bolles*, 7 Abb. Pr. 202. See, however, *contra*, *Staats v. Howlett*, 4 Den. 559.

A continuing partner may be enjoined from using the old firm name, so as to give third persons good cause to believe that the retired partner was still in the firm; the latter, in selling out to the former, not having mentioned the good-will. *McGowan Bros. Pump & Machine Co. v. McGowan*, 22 Ohio St. 370.

A receipt given by executors for money due and paid to the estate of a deceased person from former partners, in which the latter are mentioned by the name of the former partnership, under which they continued to carry on business, will not be construed as a written consent to the continued use of the former partner's name in the new business and firm, if it was executed and delivered merely for the purpose of

exhibiting the settlement of the claim. *Bowman v. Floyd*, 3 Allen, 76.

Where one of two partners in a ferry, who were tenants in common of the land adjacent, died, and his moiety was sold by his administrator, and the purchaser offered to form a partnership with the other partner, and was refused, and afterwards set up an opposition ferry, a court of equity refused to enjoin him. *Spann v. Nance*, 32 Ala. 527.

In proceedings under the act of March 21, 1861, of Ohio, the good-will of the partnership, though not a distinct item of assets, should be considered as an element of value in the appraisement of the tangible property. And if it has not been considered in the appraisement, and the surviving partner has appropriated it to his own benefit, he may be compelled to account. *Rammelsberg v. Mitchell*, 29 Ohio St. 22.

(d) See *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, *ib.* 236, and 28 *ib.* 453; *Wedderburn v. Wedderburn*, 22 Beav. 104. See, however, *Farr v. Pearce*, 3 Madd. 74, and *Hammond v. Douglas*, 5 Ves. 539, *contra*. The last case cannot be regarded as now law.

(e) See *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 24 Beav. 177; *Mellersh v. Keen*, 27 Beav. 236, and 28 *ib.* 453.

Again, when a partner retires not only from the firm, but from the business carried on by it, the continuing partners will acquire the benefit arising out of the good-will for nothing, unless it has been agreed that they shall pay for it; for they retain possession of the old place of business, and they continue to carry on that business under the old name. This, in fact, secures the good-will to them, and they cannot be compelled to pay separately for it, unless some agreement to that effect has been entered into. (*f*)

Good-will in  
case of retire-  
ment of one  
partner.

The right to continue the use of a partnership name is frequently the most important element in the good-will, and is governed by principles similar to those applicable to it. The \*purchaser of the good-will of a business ac- \*862  
quires the right not only to represent himself as the successor of those who formerly carried it on (*g*), but also to prevent other persons from doing the like. (*h*) If then the good-will of a partnership business has any saleable value at all, it seems impossible to hold that on a dissolution of a partnership, whether by death or otherwise, any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect, or at least to the effect that the assets are not to be sold. Such a right on his part is inconsistent with the right of the other partners to have the good-will sold for the common benefit of all. There are, however, authorities tending to show that, in the case of death, the surviving partners are entitled to continue to carry on business in the old name (*i*), and to restrain the executors of the deceased partner from doing the like. (*k*) But if these cases are carefully examined, they will be found scarcely to warrant so general a proposition. In *Webster v. Webster* (*l*), the ex-  
ecutors of a deceased partner sought to restrain the surviving partners from carrying on business in the name of the old firm; but the application was based upon the untenable ground that by so doing the surviving partners exposed the estate of the deceased partner to continued liability. No question of good-will appears to have been in dispute. In *Lewis*

Good-will in  
connection  
with use of  
name.

*Webster v.*  
*Webster.*

*Lewis v.*  
*Langdon.*

(*f*) See *infra*.

(*g*) *Churton v. Douglas, Johns.* 174, ante, p. 855.

(*h*) *Ib.*

(*i*) *Webster v. Webster*, 3 Swanst.

490; *Lewis v. Langdon*, 7 Sim. 421; *Robertson v. Quiddington*, 28 Beav. 536; *Banks v. Gibson*, 34 Beav. 566.

(*k*) *Lewis v. Langdon*, 7 Sim. 421.

(*l*) 3 Swanst. 490.

*v. Langdon (m)*, the V.-C. Shadwell certainly intimated his opinion to be, that surviving partners had a right to continue to carry on business in the old name (*n*); but the real question there was, whether the executors of a deceased partner were entitled to continue the use of that name; and it was held that they were not, which is quite consistent with the absence of the same right on the part of the surviving partner. There seems, moreover, to have been some agreement not set out in the report (*o*), which influenced the judge's decision; and at the time it was pronounced the

\*863 \*doctrine that good-will is, if saleable, a partnership asset, was not so well established as it is at present.

In considering this question, the right of a late partner not to be exposed to risk by having his name continued in a business must not be forgotten (*p*); and where his name is part of the name of the firm, *e. g.*, if his name is A. B., and the name of the firm is A. B. & Co., so long as he lives he would, it is apprehended, in the absence of an agreement to the contrary, be entitled to restrain his late co-partners and their representatives from carrying on business under the old name, and so continually exposing him to risk.<sup>1</sup> Neither his executors, however, nor his trustee in bankruptcy, would have the same right on the same ground; for they would not be exposed to risk. Their right, and indeed the right of any partner whose name does not appear in the name of the firm, to prevent the continuance of the use of the name of the firm, can only be maintained upon the ground that such right is involved in the more general right of having the partnership assets, including the good-will, sold for the common benefit. And if upon a dissolution this right is waived, or if the terms of dissolution are such as to preclude its exercise, then each partner can not only carry on business in competition with the others, but each can represent himself as late of, or as successor to, the old firm: and if he does not hold out the other partners as still in partnership with himself, each may use the old name without qualification. (*q*)

(*m*) 7 Sim. 421.

(*n*) See, too, *per* Lord Romilly, in 28 Beav. 536.

(*o*) See the last line in 7 Sim. 425.

(*p*) See *Routh v. Webster*, 10 Beav. 561; *Bullock v. Chapman*, 2 DeG. & Sm. 211; *Troughton v. Hunter*, 18 Beav. 470. Query if this was sufficiently

borne in mind in *Banks v. Gibson*, 34 Beav. 566.

<sup>1</sup> See *ante*, 861, note.

(*q*) See *Banks v. Gibson*, 34 Beav. 566, and the cases cited in the last four notes. See, as to describing oneself as late with or from another, *Glenny v. Smith*, 2 Dr. & Sm. 476.

The use of a partnership trade mark is another very important element in the good-will of its business; and it is clearly settled by recent decisions that a partnership trade mark is an asset of the firm, saleable on a dissolution like any other asset. (*r*)

Good-will in connection with trade marks.

Good-will is generally valued at so many years' purchase on the amount of profits.

Valuation of good-will.

\*In framing articles of partnership, too great care cannot be taken to express as clearly as possible what is intended to be done with respect to good will; and in order to avoid all ambiguity, the word itself should be made use of. There are cases which show that an agreement to take a retiring partner's share in the property and effects of the partnership (*s*), or in the partnership premises (*t*), do not entitle him to anything in respect of good-will. But in another case a clause authorizing a surviving partner to take the stock of the partnership at a valuation was held to entitle the executors of a deceased partner to a share of the value of the good-will of the partnership, and of a trade mark belonging to it. (*u*)

\*864 Agreements as to paying for good-will on retirement, &c.

When an agreement is entered into, to the effect that a retiring partner shall be entitled to be paid for his interest in the good-will of the firm, it is material to determine whether the firm is to be regarded as of definite or of indefinite duration. For upon this will depend the amount to be paid to the retiring partner.

In *Austen v. Boys* (*w*), a partnership was entered into for seven years, with power for any partner to retire. In case of retirement the retiring partner was to be paid by the continuing partners the fair market value of his interest and share in the partnership business, and in the good-will thereof. Two days before the expiration of the seven years, one of the partners retired, and the question arose, whether in ascertaining the value of his interest in the good-will of the business, the partnership business was to be considered as continuing, or as ending at the expiration of the seven years. It was held that the good-will to be valued, was the good-will of a business ending with the seven

*Austen v. Boys.*

(*r*) See *Bury v. Bedford*, 4 DeG. J. & Sm. 352; *Hall v. Barrows*, 4 DeG. J. & Sm. 150.

(*s*) See *Hall v. Hall*, 20 Beav. 139; *Kennedy v. Lee*, 3 Mer. 452.

(*t*) *Burfield v. Rouch*, 31 Beav. 241.

(*u*) *Hall v. Barrows*, 4 DeG. J. & Sm. 150.

(*x*) 24 Beav. 598, affirmed 2 DeG. & J. 626.

years, and that therefore the retiring partner's interest in it was nominal merely.

In *Wade v. Jenkins* (*y*), partnership articles stipulated that the good-will should be deemed to be of the value of 6000*l*. and should belong to the partners in the proportions  
*Wade v. Jenkins.* \*865 in which \*they were entitled to the capital, but that the value of the good-will should not be taken into account in any of the accounts between the partners. On the death of one of the partners it was held that he was entitled to a share of the good-will; and that the last-mentioned stipulation only applied to the accounts taken during the continuance of the partnership.

In *Turner v. Major* (*z*), partners agreed to dissolve and to have the assets and good-will sold by two persons selected by  
*Turner v. Major.* them; an injunction was granted to restrain one of the partners from violating this agreement by carrying on business on his own account before the good-will of the partnership had been disposed of.

19. *Getting in debts*.—When a firm is dissolved, it is usual to appoint one of the partners, or some third person, to collect and get in the debts of the firm.<sup>1</sup> But notwithstanding any such arrangement and notice thereof, a debtor to the firm will be discharged if he pays to any one of the partners. (*a*) Effect, however, will be given by the court to an agreement of the nature in question, by appointing a receiver, and, if necessary, granting an injunction. (*b*) If the agreement is under seal and is broken, an action for damages may be brought upon it. (*c*) But it has been held that an agreement not under seal entered into between two members of a dissolved partnership, to the effect that

(*y*) 2 Giff. 509.

(*z*) 3 Giff. 442.

<sup>1</sup> On a settlement of partnership affairs, if it is agreed that one of the partners shall collect a note and accounts, for the benefit of both, it will be presumed that the money, as fast as received, should be divided between the parties. *Metcalf v. Fouts*, 27 Ill. 110.

Upon the dissolution of a partnership it was agreed that one of the partners should collect the bills of the firm, and that he should be allowed for his ex-

penses, in so doing. He employed an agent, who was at the time engaged in other business for him, to collect the bills: *Held*, that the partner was entitled to be allowed only for the amount paid the agent, and not for the value of the latter's services in the employment from which he took him, which was much greater. *Porter v. Wheeler*, 37 Vt. 281.

(*a*) *Ante*, p. 275.

(*b*) *Davis v. Amer*, 3 Drew. 64.

(*c*) As in *Belcher v. Sikes*, 8 B. & C. 185.

one of them shall get in the debts of the firm, and pay what he shall receive in respect thereof to his co-partner, is not an agreement on which the latter can maintain any action for damages in case the debts are got in, and the money received on account of them is not paid over; for it is said there is no consideration for such an agreement. (*d*) But it seems to have been admitted, in the case in which this was decided, that if the partner to whom the money when received is to be paid agrees that he will take no steps to collect the debts himself, that will be a sufficient consideration to support the promise to pay.

\*When a partner retires, on the terms that the continuing \*866 partners are to get in the old debts, and that such debts, when got in, are to be taken into account in ascertaining the share of the retiring partner, the latter will have a right to charge the continuing partners with whatever debts they may choose to take to themselves and not get in. As observed by Lord Romilly: "If continuing partners who are bound to get in debts belonging to an old firm think fit to enter into a new agreement with the debtors of the old firm, by which those debtors become the debtors of the new firm, and the debts of the old firm become merged in that of the new firm by a security taken for the aggregate debt, such continuing partners are liable to the retiring partners for the amount of the old debt as one of the assets received by them." (*e*)

Getting in debts when one firm succeeds another.

20. *Assignment of share, &c.*—When a partner retires or dies, and he or his executors are paid what is due in respect of his share, it is customary for him or them formally to assign and release his interest in the partnership, and for the continuing or surviving partners to take upon themselves the payment of the outstanding debts of the firm, and to indemnify their late partner or his estate from all such debts.

20. Assignment of share, &c. by retiring partner.

An assignment of all the partnership stock, debts, sums of money, and all other the personal estate and effects of the assignors as partners, did not before the Judicature acts give the assignees a right to sue one of the assignors for a debt due from him to the partnership. (*f*) But if one of the assignors after

Assignment of debts.

(*d*) See *Lewis v. Edwards*, 7 M. & W. 300, where such an agreement was come to between a solvent partner and the assignees of a bankrupt partner.

(*e*) *Lees v. Laforest*, 14 Beav. 262.

(*f*) See *Aulton v. Atkins*, 18 C. B. 249.

the execution of the deed releases a debt which has been assigned, or negotiates a bill held by the firm, he becomes liable to an action, for he has no right to derogate from his own grant. (*g*)

An assignment by a partner of his share and interest in the firm to his co-partners, in consideration of the payment by them of what is due to him from the firm, is regarded as a *sale* of property within the meaning of the Stamp acts; and consequently the deed of assignment requires an *ad valorem* stamp. (*h*) But if the retiring partner, instead of \*867 assigning \*his interest, takes the amount due to him from the firm, gives a receipt for the money, and acknowledges that he has no more claims on his co-partners, they will practically obtain all they want; and such a transaction, even if carried out by deed, could hardly be held to amount to a sale, and no *ad valorem* stamp, it is apprehended, would be payable. (*i*)

21. *Indemnity to outgoing partner.*—An indemnity is ordinarily given by a bond or covenant entered into by the continuing or surviving partners, in consideration of the assignment to them of all the share and interest of the retiring or deceased partner.<sup>1</sup> The bond or covenant should be joint and

(*g*) *Aulton v. Atkins*, 18 C. B. 249.

(*h*) *Christie v. Commissioners of Inland Revenue*, L. R. 2 Ex. 46; *Phillips v. Same*, ib. 369; *Potter v. The Commissioners of Inland Revenue*, 10 Ex. 147. These cases overrule *Belcher v. Sikes*, 6 B. & C. 234.

(*i*) In *Steer v. Crowley*, 14 C. B. N. S. 337, a release by the executors of a deceased partner did not state the consideration, and bore only a common deed stamp; and it was held that the deed was a good document of title, although some penalty might be payable by the parties to it, or their solicitors, for not stating the consideration.

<sup>1</sup> An agreement by one to "release" his retiring partner from the firm debts, amounts to a promise to pay them. *Griffith v. Buck*, 13 Md. 102.

An agreement for the dissolution of a partnership provided that the assets of the firm should remain in the hands of one of the partners, who agreed that he

would therefrom pay the debts of the partnership as they matured, and should be charged interest on the stock and property purchased by him, and on all sums received by him, and credited with interest on all sums by him paid: *Held*, that he only agreed to apply the assets to the payment of debts, and did not absolutely assume the payment of them. *Topliff v. Jackson*, 12 Gray, 565.

The firm of A, B and C dissolved partnership, and the members signed an agreement by which all the property of the firm was assigned to A in trust to sell, and with the proceeds to pay the debts of the partnership. A agreed to pay B and C \$100 each for their interest in the concern, to discharge all the firm debts, and to save B and C harmless therefrom. B and C indorsed on the instrument their receipt for the \$100. In an action by B to recover from A the amount of a debt of the firm that he

several. (k) The effect of such a bond or covenant is to render a retiring partner, as between himself and his late co-partners, a

had paid, the agreement was construed to make A a purchaser, and not a mere gratuitous trustee, and the assignment of the partnership property was *held* to constitute a sufficient consideration to support A's promise to pay the debts of the firm, so that the plaintiff was entitled to recover the actual damage sustained from the breach of the contract. *Rose v. Roberts*, 9 Minn. 119.

There is nothing in the relation of partners which makes a mortgage, given by one to the other on dissolution of the partnership, to indemnify him against the partnership debts, fraudulent. *Whitmore v. Parks*, 3 Humph. 95.

If a partner after a dissolution of the partnership, assign all his interest in the partnership property for a valuable consideration, and take a covenant of indemnity against all liability for the debts of the partnership, the covenant does not cover a debt which does not appear upon the partnership books, and was not made known to the assignee at the time of the contract of indemnity. *Case v. Cushman*, 3 Watts & S. 544.

Upon the dissolution of a co-partnership between D. and H., H. purchased the interest of D., and gave to him a bond signed by himself and another, conditioned to indemnify and save D. harmless from all, and singular the debts and liabilities of the firm, at the end of the formal part of the bond were added the words "liabilities as per schedule of indebtedness hereto annexed." In an action upon the bond: *Held*, that the general terms of the condition were limited and qualified by the added clause; and that the obligors were not liable for a firm debt not scheduled. *Holmes v. Hubbard*, 60 N. Y. 183.

Where one of two partners sells out his interest to the other, who agrees to pay all the firm debts and indemnify the selling partner, which agreement is guaranteed by a surety, such surety is not liable in an action brought against him by a creditor of the firm to recover one of the debts so guaranteed, as in such case there is no privity of contract between the parties to the suit. *Campbell v. Lacock*, 40 Pa. St. 448.

See, also, *Mackintosh v. Tatman*, 38 How. Pr. 145.

Where, however, on the dissolution of a partnership, one partner takes the partnership effects, and executes to the other a bond with surety, conditioned for the payment of all the partnership debts, such bond is in equity held to be a trust fund, in which all the creditors have an interest, and which they (the partners being insolvent) can subject to the payment. *Wilson v. Stillwell*, 14 Ohio St. 464.

See, also, *Deval v. McIntosh*, 23 Ind. 529.

In *Hood v. Spencer*, 4 McLean, 163, it was held that a bond to relieve a late co-partner from the debts of the firm and to pay the same, is not a contract of indemnity merely, but an action may be maintained upon it either by the obligee, or by the creditors of the firm, for non-payment of such debts. *Hood v. Spencer*, 4 McLean, 168.

If a partner has sold out to his co-partner, and has taken a bond of indemnity as security that the latter will pay the debts of the firm, according to agreement, he cannot, it is held, be substituted, in the place of the creditors of the old firm, to enforce their claims against such co-partner, or enforce, against his co-partner, executions ob-

(k) See, as to this, *ante*, p. 372.

surety only for the payment of the partnership debts (*l*);<sup>2</sup> and to render him their specialty creditor if, notwithstanding their indemnity, he is compelled to pay those debts. (*m*)

tained against himself by the creditor, or subject the partnership property, sold to the latter, to the payment of the debts. *Griffin v. Orman*, 9 Fla. 22.

On the other hand, in *Merrill v. Green*, 55 N. Y. 270, it was held that where one partner, after being bought out by his co-partners, under covenant that they will pay the firm debts and indemnify him against them, pays debts and becomes their surety, he is entitled to come in as a creditor and be subrogated to the rights of the creditors whom he has paid.

When, upon plaintiff's retiring from a firm, the other members thereof gave him a covenant of indemnity against any loss or damage on account of the firm debts: *Held*, that no cause of action accrued thereon to plaintiff until he was subjected to damage on account of the partnership liabilities, and that the statute of limitations did not run until then. *Carter v. Adamson*, 21 Ark. 287.

Where one purchases the interest of one of the partners in a partnership, and takes his place in the firm, not agreeing to pay at once all the debts of the firm, but only that he will "assume" the share of the liabilities of the firm which belong to the outgoing partner, the intent and meaning of such assumptions is to indemnify the outgoing partner. If the latter is obliged to pay any of the old debts, under such circumstances, then, and then only, he is entitled to maintain his action. *Coleman v. Lansing*, 65 Barb. 55.

In *Peacey v. Peacey*, 27 Ala. 683, how-

ever, it was held that on the dissolution of a partnership, if the remaining partner, who takes all the goods and partnership effects, covenants to become solely responsible for the outstanding partnership debts, the covenant is not one of indemnity merely, but binds him to discharge the retiring partner, within a reasonable time, from all liability for the debts; and if he dies without complying with his engagement, and his estate is declared insolvent, the retiring partner has a claim against the estate to the amount of the outstanding debts.

On the dissolution of the partnership of A and B, in June, which was then insolvent, A and C, with whom A formed a new partnership, contracted with B to pay all the debts due from the late firm of A & B, amounting to \$1,735, and also to save B harmless from any cost, trouble or liability on account of such debts. These debts were all then due to the respective creditors of A and B; and A & C proceeded to pay them; but on the 24th of October following, there remained of such debts \$635 unpaid. B, not having paid any part thereof, nor been subjected to any trouble on account of them, brought his action against A and C for a breach of the contract: *Held*,

1. That though where the contract was one of indemnity merely, no action thereon will lie, for the liability or exposure to loss, until actual damage, capable of appreciation, has been sustained by the plaintiff; yet where the contract is to perform some act for the plaintiff's benefit as well as to indemnify

(*l*) *Rodgers v. Maw*, 4 Dowl. & L. 66; *Oakley v. Pasheller*, 4 Cl. & Fin. 207, *ante*, p. 447.

<sup>2</sup> See *Maier v. Canavan*, 8 Daly, 272,

*ante*, p. 440, note; *Thurber v. Corbin*, 51 Barb. 216; *Thurber v. Jenkins*, 36 How. Pr. 66.

(*m*) *Musson v. May*, 3 V. & B. 194.

It is to be observed, that in the absence of any agreement to that effect, a retiring partner or the executor of a deceased partner has no right to an indemnity from the other <sup>Right to indemnity.</sup> partners, except so far as he may be entitled to have the assets of

and save him harmless from the consequences of non-performance, the neglect to perform the act, being a breach of contract, will give an immediate right of action; consequently, in this case, the action brought by B was sustainable.

2. That it was the duty of A and C, under the contract, to pay the debts of A & B, according to their tenor, which, as they were all then due, was immediately.

3. That if otherwise they should be paid in reasonable time, which had then elapsed.

4. That the rule of damages was, the amount of debts unpaid at the commencement of the action with interest. *Lathrop v. Atwood*, 21 Conn. 117.

So, in *Beny v. McLean*, 11 Md. 92, it was held that under a written contract by the continuing partners in a firm to pay the debts of the firm and acquit a retiring partner, but not stating when they are to be paid, those which will not be due until after the execution of the contract, need not be paid until they fall due, and those which are then due are to be paid in a reasonable time. *Beny v. McLean*, 11 Md. 92. See, also, *Dorsey v. Dashiell*, 1 Md. 198; *Faust v. Burgevin*, 25 Ark. 170.

A and B, being partners, dissolved their partnership, A giving his note to B for his interest in the partnership property and agreeing to pay all the partnership debts, except a note to one S., which B assumed and agreed to pay. In a suit by B against A on the note of the latter, A answered, by way of set-off, the agreement of B to pay the note held by S., averring that it was due and wholly unpaid, and that he, A, was personally liable for the amount thereof:

*Held*, that the answer was a good defence to an amount equal to the note due to S. *Mullendore v. Scott*, 45 Ind. 113.

Where, upon the dissolution of a firm, one partner covenants with his co-partner to hold him harmless from all liability or obligation to pay the debts of the firm, the recovery of judgment on these debts, or any of them, is a breach of the covenant. *Pope v. Hays*, 19 Tex. 375.

So, a judgment in a suit against B, one member of a dissolved firm, on a firm note, for want of an affidavit of merits. *Held*, to be *prima facie* evidence of his right to maintain an action against C, another member thereof, on C's covenant of indemnity to pay all the firm debts; notwithstanding a judgment had been recovered in another State on the same note against all the members except B, who had not then been served with process. In B's action against C the validity of the judgment against B could not be inquired into. *Bennett v. Cadwell*, 70 Pa. St. 253.

The plaintiff, upon retiring from the firm of which he had been a member, conveyed to his co-partners his interest in the partnership, the latter agreeing to pay all the debts, and save him harmless therefrom. Judgment was subsequently recovered against the plaintiff and his former co-partners upon a firm debt. The plaintiff paid a portion of the amount due to the judgment creditors, taking from them an agreement in consideration thereof not to molest him or take his property upon the judgment, but reserving all their rights against all the other judgment debtors: *Held*, that the plaintiff might recover the amount so paid in an action against his former

the firm applied in payment of its debts, and to enforce contribution in case he has to pay more than his share of those debts. But if all the assets of the firm are assigned to the continuing or the

partners. *Brewer v. Worthington*, 10 Allen, 329.

A and B, who were partners under the firm of A & Co., contracted with C for the delivery of certain stock and materials to them. After the delivery of a portion, B sold his interest in the business and firm to D, who continued the same business, under the same firm, with A, B taking from D a written agreement "to discharge him from all liabilities on account of purchases of stock and materials as one of the original firm of A & Co." The rest of the stock and materials was thereafter delivered by C, who did not know of the change in the firm, and A afterwards gave to C a note signed A & Co. for a portion of the price, dated back to the time when A & B were in partnership: *Held*, that B upon paying the note and balance of the account, might maintain an action upon the agreement against D to recover the same. *Nichols v. Prince*, 8 Allen, 404.

Where, on the dissolution of a firm, one of the partners covenants to pay all the company debts, in an action against him for a breach of that covenant by his partner, who has paid a debt of the firm, it is not necessary to aver notice to the defendant of the debt, nor of the suit, recovery and payment. *Clough v. Hoffman* 5 Wend. 499:

Two partners sold their partnership effects to a third person, and the partnership was subsequently dissolved. One partner then assigned to the other all his interest in the partnership, the assignee taking all the partnership effects into his own hands: *Held*, that this operated as a discharge, by the act of the parties, of a covenant of the assignor, previously made with the assignee, to pay the debts of the partner-

ship out of the partnership effects. *Austin v. Cummings*, 10 Vt. 26.

D. and H. entered into a co-partnership in brick-making. D. gave his note for one-half the bricks on hand, and for one-half of the yard and the brick to be made for three years. At the end of 11 months the partnership was dissolved. D. had in the meantime paid \$200 on his \$500 note. The written terms of dissolution specified what each of the partners was to do, but said nothing about the note: *Held*, that the presumption was that it was not extinguished, but was to be paid. *Durham v. Hartlett*, 32 Ga. 22.

A bond given to one of a firm upon the sale of his partnership interest, conditioned for the payment of the partnership liabilities, is satisfied by the payment of the debts to the amount of the penalty, though made through the assistance of a succeeding firm. *Perry v. Spencer*, 23 Mich. 89.

A guaranty that one partner in a distillery shall pay a government tax, and thereby protect the interest of his co-partner in the firm, is not discharged by such partner's paying the tax out of the partnership property without the consent of the other, but if it is so paid with his consent, this will be a compliance with the contract. *Smith v. Riddell*, 87 Ill. 165.

P. and K. dissolved partnership, K. taking the partnership property and giving P. a note for \$938, and agreeing to pay all partnership liabilities. K. subsequently failed, without having paid partnership debts to the amount of \$1500, and informed P. that he could not pay them, and that P. must pay them. Finally, upon K.'s proposal, P. agreed to pay K. \$700, upon being indemnified, by certain persons named,

surviving partners, it is only fair that they should undertake to pay its debts; and if it appears that it was the intention of all parties that they should do so, effect will be given to such intention, although the undertaking on their part is not explicit in its terms. (*n*)

When a retiring partner assigns his interest in the partnership assets, and obtains from the continuing partners a \*covenant of indemnity, his lien on the partnership assets seems to be at an end.<sup>1</sup> In *Re Langmead's trusts* (*o*) the assignment was made expressly subject to the payment of the retiring partner's share of the partnership debts. The continuing partner became bankrupt; and the retiring partner's executors were compelled to pay the unsatisfied partnership debts. It was nevertheless held that they had no lien on the specific assets of the old firm, but were confined to their remedy on covenant for indemnity.

\*868 Effect of express indemnity on lien.

22. *Arbitration clauses*.—With respect to these, it is to be observed:—

22. Arbitration clauses.

1. That an agreement to refer to arbitration is one which a court will not decree to be specifically performed (*p*); and

2. That it is one which (independently of the Common law procedure act of 1854) cannot be effectually set up as a defense to any action relative to a matter agreed to be referred (*q*); unless, indeed the reference has been expressly made a condition precedent to the right to sue. (*r*) At the same time a court will sometimes decline to interfere between partners who have agreed that their disputes

against all said partnership debts, which indemnity was given, whereupon P. surrendered said note, and K. paid P. the balance, after deducting \$700, and P. discharged the mortgage given to secure the same: *Held*, that the indemnity was a sufficient consideration for the compromise, and that P. was entitled to recover said \$700 on said note, the transaction being free from fraud on the part of K. *Parmepster v. Kingsley*, 45 Vt. 362.

(*n*) See *Saltoun v. Houstoun*, 1 Bing. 433.

<sup>1</sup> See *ante*, 683, note.

(*o*) 7 DeG. M. & G. 353. See, too, *Lingen v. Simpson*, 1 Sim. & Stu. 600.

(*p*) *Agar v. Macklew*, 2 Sim. & Stu.

418; *Street v. Rigby*, 6 Ves. 818. An action will lie for not referring in pursuance of an agreement so to do, *Livingston v. Ralli*, 5 E. & B. 132.

(*q*) *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Edwards v. Abercayron, &c.* Soc. 1 Q. B. D. 563; *Cooke v. Cooke*, 4 Eq. 77; and the older cases referred to there.

(*r*) See *Scott v. Avery*, 5 H. L. C. 811; *Halfhide v. Fenning*, 2 Bro. C. C. 336. The last case is generally regarded as overruled, but *quere* whether it is not capable of being supported on the principle recognized in *Scott v. Avery*. See the observations of Lord St. Leonards in *Dimsdale v. Robertson*, 2 Jo. & Lat. 91, and of V.-C. Wood in *Cooke v. Cooke*, 4 Eq. 77.

should be referred to arbitration, and who have not attempted so to settle them. (s)

By 17 & 18 Vict. c. 125, which contains several important provisions respecting agreements to refer to arbitration, it is amongst other things (by § 11) enacted that,—

\*869 “Whenever the parties to any deed or instrument in writing, to be here-  
after made or executed, or any of them, shall agree (t) that any then \*ex-  
isting or future differences between them, or any of them, shall be referred  
to arbitration, and any one or more of the parties so agreeing, or any person or  
persons claiming through or under him or them, shall nevertheless  
commence any action at law or suit in equity against the other party  
or parties, or any of them or any person or persons claiming through or under him  
or them, in *respect of the matters so agreed to be referred*, or any of them, it shall  
be lawful for the court in which action or suit is brought, or a judge thereof, on appli-  
cation by the defendant or defendants, or any of them, after appearance, and before  
plea or answer, upon being satisfied that no sufficient reason exists why such matters  
cannot be or ought not to be referred to arbitration according to such agreement  
as aforesaid, and that the defendant was at the time of the bringing of such action  
or suit, and still is, ready and willing to join and concur in all acts necessary and  
proper for causing such matter so to be decided by arbitration, to make a rule or  
order staying all proceedings in such action or suit, on such terms as to costs and  
otherwise, as to such court or judge may seem fit; provided always that any such rule  
or order may at any time afterwards be discharged or varied, as justice may require.”

The section does not apply where a submission to refer has been revoked before action. u) Nor is the section imperative; and the courts in the exercise of their discretion have declined to interfere where there were several matters in dispute, some only of which were within the agreement to refer (v); where one of the parties had become bankrupt (x); where there was a *bonâ fide* suggestion of fraud (y); where there was really no question in dispute, and the defendant's only object was delay (z); where the object was to stop a suit, and not really to settle a dispute, which the defendant desired to refer before the suit was commenced. (a)

(s) *Waters v. Taylor*, 15 Ves. 10.

(t) In *Blyth v. Lafone*, 1 E. & E. 435, it was held that the agreement to refer must be contained in the instrument on which the dispute arises. But this has been overruled. See *Randell, Saunders, and Co. v. Thompson*, 1 Q. B. D. 748, and *Mason v. Haddan*, 6 C. B. N. S. 526.

(u) *Randell, Saunders, and Co. v. Thompson*, 1 Q. B. D. 748.

(v) *Wheatley v. Westminster, &c. Coal Co.* 2 Dr. & Sm. 347.

(x) *Pennell v. Walker*, 18 C. B. 651.

(y) *Wallis v. Hirsch*, 1 C. B. N. S. 316.

(z) *Lury v. Pearson*, ib. 639. The true grounds of this decision appear to have been those stated above, but the report is obscure.

(a) *Corcoran v. Witt*, 8 Ch. 476 n., explained in 16 Eq. 571.

Where, however, there is a *bond fide* dispute within the meaning of an agreement to refer, and there is no satisfactory reason why such dispute should not be settled by arbitration, legal proceedings will be stayed (*b*); even although the \*agreement \*870 to refer is contained in articles of partnership for a term of years which has expired. (*c*)

In one case the court refused to interfere where the plaintiff sought to have a partnership dissolved on the ground of the defendant's misconduct, and to have a receiver appointed (*d*), but this case has not been followed (*e*); nor is there any reason why the court should not appoint a receiver, if necessary, pending the arbitration. (*f*)

Under a general submission by partners of all matters in difference between them, an arbitrator may dissolve the partnership (*g*); and may order one partner to pay or <sup>Power of arbitrator.</sup> give security for the payment of a certain sum to the other (*h*); and apportion the assets between them (*i*); and order conveyances to be made (*k*); and direct one partner to sue in the name of himself and others, and give them a bond of indemnity (*l*); and restrain one partner from carrying on business within certain limits (*m*); and direct mutual releases to be executed. (*n*) It seems, however, that the arbitrator cannot appoint a receiver to collect and get in the partnership assets and credits (*o*); nor direct one of the partners to

(*b*) As in *Plews v. Baker*, 16 Eq. 564; *Willesford v. Watson*, 8 Ch. 473, and 14 Eq. 572; *Randeker v. Holmes*, L. R. 1 C. P. 679; *Seligmann v. LeBoutillier*, ib. 681; *Russell v. Pelligrini*, 6 E. & B. 1020; *Hirsch v. Thurn*, 4 C. B. N. S. 569.

(*c*) *Gillet v. Thornton*, 19 Eq. 599.

(*d*) *Cook v. Catchpole*, 10 Jur. N. S. 1068.

(*e*) *Plews v. Baker*, 16 Eq. 564; *Gillet v. Thornton*, 19 Eq. 599.

(*f*) See as to this, *infra*, note (*o*).

(*g*) *Green v. Waring*, 1 W. Blacks. 475; *Hutchinson v. Whitfield*, Hayes, Ir. Ex. 78. *Simmonds v. Swaine*, 1 Taunt. 548, shows that a dissolution need not be awarded.

(*h*) *Simmonds v. Swaine*, 1 Taunt. 548.

(*i*) *Lingood v. Eade*, 2 Atk. 505; *Wood v. Wilson*, 2 Cr. M. & R. 241; *Wilkin-*

*son v. Page*, 1 Ha. 276.

(*k*) *Wood v. Wilson*, 2 Cr. M. & R. 241.

(*l*) *Burton v. Wigley*, 1 Bing. N. C. 665; and see *Goddart v. Mansfield*, 19 L. J. Q. B. 305; *Philips v. Knightley*, 2 Str. 903.

(*m*) *Morley v. Newman*, 5 D. & R. 317. In *Burton v. Wigley*, 1 Bing. N. C. 665, the award permitted a partner to carry on business, although the articles provided for his not doing so.

(*n*) *Lingood v. Eade*, 2 Atk. 505, where the arbitrator directed such releases to be settled by a Master in Chancery.

(*o*) *Lingood v. Eade*, 2 Atk. 505; *Re Mackay*, 2 A. & E. 356. But a receiver was appointed in *Routh v. Peach*, 2 Anstr. 519, and 3 ib. 637.

pay money to him (the arbitrator) in order that he may apply it in payment of certain specified debts. (*p*) It has also been \*871 held that an arbitrator \*cannot enter into the question whether any part of a premium paid on entering into the partnership shall be refunded, unless the submission pointedly raises that question for determination. (*q*)

23. *Penalties and liquidated damages.*—The last clause in a partnership deed is often one by which each partner binds himself to pay, either by way of penalty or by way of liquidated damages, a certain sum in case of the infringement by him of any agreement contained in the previous clauses. A stipulation that on the breach of any agreement in the articles, a sum shall be paid by way of penalty is of little real use, and is sometimes worse than useless, for the sum mentioned will not be payable unless damage to its amount can be proved (*r*); and on the other hand the penalty generally limits the compensation which can be obtained, even although damage to a greater extent has been sustained. (*s*) Moreover, a stipulation that for any breach, however small, a large sum shall be paid by way of liquidated damages, is always construed by the courts as a stipulation for payment of that sum by way of penalty. (*t*) An agreement to pay a definite sum as liquidated damages in one or two specified events, *e. g.*, on carrying on business within prescribed limits, may no doubt prove useful (*u*); but even in these cases it must not be overlooked, that if the stipulated sum is paid, a court will not interfere by injunction. (*x*) The mere existence of an agreement for liquidated damages does not, however, necessarily make a contract alternative, and preclude such interference. (*y*)

(*p*) *Re Mackay*, 2 A. & E. 356.

(*q*) See *Tattersall v. Groote*, 2 Bos. & P. 131.

(*r*) See the note to *Gainsford v. Griffith*, 1 Wms. Saund. 57.

(*s*) See *Clarke v. Ld. Abingdon*, 17 Ves. 106.

(*t*) See *Kemble v. Farren*, 6 Bing. 141; *Ranger v. The Great Western Rail. Co.* 5 H. L. C. 119.

(*u*) *Atkins v. Kinnear*, 4 Ex. 776; *Reynolds v. Bridge*, 6 E. & B. 528, may

be referred to as examples. See, too, *The East India Co. v. Blake*, Finch. 117, where it was held that though a court of equity would relieve against a penalty, it would not relieve against payment of liquidated damages.

(*x*) *Sainter v. Ferguson*, 1 Mac. & G. 286; *Woodward v. Gyles*, 2 Vern. 119.

(*y*) *French v. Macale*, 2 Dr. & War. 269; *Coles v. Sims*, 5 DeG. M. & G. 1; and see *Avery v. Langford*, Kay, 663; *Clarkson v. Edge*, 33 Beav. 227.

## \*CHAPTER X.

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## OF ACTIONS BETWEEN PARTNERSHIPS AND COMPANIES AND THEIR MEMBERS, AND BETWEEN THE MEMBERS THEMSELVES.

## SECTION I.—GENERAL OBSERVATIONS.

1. *Law before the Judicature acts.*

THE mutual rights and obligations of partners, shareholders, and directors, having been examined, it is proposed in the next place to consider the means by which those rights and obligations can be enforced.

It has been already seen (Bk. ii., c. 3) that before the Judicature acts there was no method by which an ordinary firm could sue or be sued by any of its members, either at law or in equity; for the firm as distinguished from the persons composing it, had no juridical existence. All proceedings, therefore, which had for their object the enforcement of the mutual rights and obligations of partners, had to be taken by some or one of the members of a firm individually against some others or other of them also individually. The consequences of this rule were important, for it followed from it—

1. That no action at law could be brought by one partner against another for the recovery of money or property payable to the firm as distinguished from the partner suing;

2. That no suit in equity was maintainable by one partner against another with respect to a matter in which the firm was interested, without bringing all the members thereof before the court. This rule was subject to exceptions, as will be seen hereafter; but it was established as a rule, and flowed from the non-recognition of the firm.

873\* \*Moreover, until the law was altered by 31 & 32 Vict. c. 116, no criminal prosecution was sustainable by one partner against another for stealing the property of the firm. (a) But this inconvenience has been removed by the above mentioned statute. (b)

These consequences, which were much more serious to large partnerships than to small, were avoided by incorporating the firm; for a member of a body corporate might always sue or be sued by it just as if he were not a member; and whether the body corporate was a company having gain for its object or not, is and always was wholly immaterial with reference to its capacity of suing and being sued.

The institution of a public officer to sue and be sued on behalf of the members of an unincorporated company, is not necessarily so efficacious for the purposes now under discussion as the incorporation of the company. For the public officer may be so constituted as to represent the members as individuals, and only to represent them all, and not all less some or one of them. If in such a case he sues one of the members of the company which he represents, he in fact either represents the member sued as well as all the other members, or nobody at all, and in either case his action will be improper. (c) In most modern acts of Parliament, however, care has been taken to avoid

(a) In *R. v. Warburton*, L. R. 1 Cr. Ca. Res. 274, it was held that a partner might be convicted of conspiring with others to defraud his co-partner by falsifying the accounts of the firm, and thereby, in effect, robbing his co-partner. But in *R. v. Evans*, 9 Jur. N. S. 184, a partner who misrepresented the partnership accounts, and thereby obtained more than his share of money, was held not liable to conviction for obtaining money under false pretences: and in *R. v. Loose*, 29 L. J. M. C. 633, *R. v. Marsh*, 3 Fos. & Fin. 523, *R. v. Bren*, 3 N. R. 176, members of friendly societies indicted for stealing the moneys of the societies were held not liable to conviction. However, in *R. v. McDonald*, 7 Jur. N. S. 1127, a servant who was paid a salary and a percentage of profits was convicted of embezzle-

ment; and in *R. v. Burgess*, 2 N. R. 85, and in *R. v. Webster*, 7 Jur. N. S. 1208, a member of a friendly society was convicted of larceny, and in *R. v. Proud*, 10 W. R. 62, of embezzlement. In the last three cases, however, there were special circumstances as regards the possession of the money and the trust reposed in the prisoner. A shareholder in a banking company governed by 7 Geo. 4, c. 46, was convicted of embezzling money of the company in *R. v. Atkinson*, Car. & Marsh. 525.

(b) See on it, *R. v. Smith*, L. R. 1 Cr. Ca. R. 266.

(c) See *Hichens v. Congreve*, 4 Russ. 562; *McMahon v. Upton*, 2 Sim. 473; *Hughes v. Thorpe*, 5 M. & W. 656; *Seddon v. Connell*, 10 Sim. 58. See, too, *per Lord Eldon* in *Van Sandau v. Moore*, 1 Russ. 460 and 472.

this objection, and to render the public officer the representative of the company as distinct from the individuals composing it; and where this is done, legal proceedings between the public officer and those individuals or any of them, are theoretically as unobjectionable as are legal proceedings between incorporated companies and their shareholders. The tendency in modern times, moreover, is to regard companies empowered to sue and be sued more in the light of corporate bodies than formerly, and to treat public officers as the representatives of collective wholes rather than as the representatives of the members individually. (*d*)

The inability of a *firm* to sue one of its members, and *vice verâ*, arose from the circumstance that in an action by a firm against one of its members, or *vice versâ*, the member in question must be both a plaintiff and a defendant. Practically it is often extremely inconvenient to have recourse to the intervention of a trustee, and to procure agreements to be made with him so as to enable him to sue and be sued thereon. But, inconvenient as this was, it was only through the intervention of a trustee that agreements between partners and the firms to which they belonged, could be so entered into as to be enforceable by action at law. (*e*) An agreement by each partner with his co-partners might indeed be framed so as to enable one to be sued by the others, if care was taken to exclude the partner sued from all share in what was sought to be recovered from him, and to exclude the partner suing from all obligation to contribute to his own payment (*f*); but an agreement drawn so as to accomplish both these objects, was not generally convenient.

Legal proceedings between unincorporated and unprivileged companies and their members.

It was not, however, competent for partners to establish, even as amongst themselves, a rule that some officer, *e. g.* the treasurer or secretary of the firm for the time being, should, as it were, represent the firm and sue and be sued on its behalf \*accordingly. Consistently with the established law, effect could not be given to such a rule, and it was simply nugatory. (*g*)

\*875 Stipulation that secretary, &c., for time being shall sue.

(*d*) See the next section, sub-division, 3.

(*e*) See *Bedford v. Brutton*, 1 Bing. N. C. 399, as to an action by a partner against the trustees of himself and co-partners.

(*f*) *Radenhurst v. Bates*, 3 Bing. 463.

(*g*) See *Evans v. Hooper*, L. R. I. Q. B. D. 45; *Corner v. Maxwell-Irwin, Jr.* Rep. 10 C. L. 354; *Gray v. Pearson*, L. R. 5 C. P. 568, the case of a mutual marine insurance society; *Hybart v.*

In consequence of this doctrine, companies which were neither incorporated nor empowered to sue their own shareholders by public officers, frequently found it extremely difficult to compel the payment of money due to them from such shareholders by any direct proceeding against them. This difficulty led to the crooked expedient of "putting a creditor on a shareholder;" that is to say, of compelling a shareholder to pay what he owed to the company by inducing some creditor of the company to single him out and sue him for the company's debt at the costs of the company. This expedient was usually found to answer the purpose, inasmuch as the shareholder could only resist the creditor's action by pleading the non-joinder of the other shareholders in abatement; and this it was almost always impossible to do with effect. Rather therefore than allow the creditor to obtain judgment, the unfortunate shareholder made terms with the directors. It is obvious that the grossest oppression might be exercised in this manner, and whatever might be said in defense of putting a creditor on an obstinate shareholder who would not pay, and could not be otherwise made to pay, what he justly owed to the company, nothing could possibly be said in its favor in any other case. For-

Interference of  
a court of  
equity in  
such a case.

tunately, courts of equity would always interfere in such cases, and both restrain proceedings by the creditor and compel those who "put him on," to deal fairly with the person sued. Whatever the rights of the creditor might have been, if he had been suing *bonâ fide* (*h*), he was not regarded in cases of the present description as having any greater rights than those whose tool he was. (*i*) If the shareholder sued was entitled to have the accounts of the company taken, and to have its assets applied in payment of its debts, the court would make a decree accordingly (*k*), if the necessary parties were before the court. (*l*) But a court of equity would only interfere to protect the shareholder on the terms of his doing what was just

Parker, 4 C. B. N. S. 209, the case of a cost-book mining company. By 32 & 33 Vict. c. 19, calls may now be sued for by the pursuer.

(*h*) If he was so suing the court would not interfere, *Green v. Nixon*, 23 Beav. 530; *Beck v. Dean*, 3 Jur. N. S. 14.

(*i*) See *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosanquet*, 16 Beav.

84, and *Bargate v. Shortridge*, 5 H. L. C. 297; *Horn v. Kilkenny, &c. Rail. Co.* 1 K. & J. 399. See, also, *Woodhams v. Anglo-Australian Co.* 2 DeG. J. & Sm. 162.

(*k*) *Fernihough v. Leader*, 4 Ra. Ca. 373, and *Lewis v. Billing*, *ib.* 414.

(*l*) See *Sibley v. Minton*, 27 L. J. Ch. 53.

towards the company; and would, if there was reason to believe that he ought to pay what the company sought to make him pay, require him to pay that sum into court. (*m*)

The mere fact, moreover, that a shareholder in a company is being sued by a creditor at the instance of the company, is not sufficient to induce a court to make an order for winding up the company. (*n*)

Winding up in such a case.

## 2. *Effect of Judicature acts.*

The general effect of the Judicature acts, so far as they relate to legal proceedings by partnerships and companies, has been already investigated (Bk. ii., c. 3); and it was then seen that a firm can now sue and be sued in its mercantile name; that where parties are numerous and have a common interest, some of them may sue and be sued on behalf of all in respect thereof. Further, there is now the same facility in arranging parties to actions in all divisions of the High Court as there was formerly in arranging parties to suits in equity; and the fact that an account has to be taken in order to ascertain what is due from one party to another is no longer any reason why an action by one against the other should fail; at most, such a circumstance may render it expedient to transfer the action from one division of the High Court to the other at some stage of the action. Nor is there any danger now of an action for an account being held unsustainable on the ground that an action for damages is the proper remedy. (*o*)

\*With respect to actions by the firm, it has been already pointed out that the name of the firm is only a compound expression, for denoting the individuals composing the firm when the name of the firm is used. It has

Actions by and against the firm.

(*m*) See *Cutts v. Riddell*, 1 DeG. & S. 226; *Sibley v. Minton*, 27 L. J. Ch. 53. This last was the case of a cost-book mining company, a shareholder in which would not pay his calls.

(*n*) See, *infra*, book iv. ch. 3, § 4, and *Ex parte* Wyld, 1 Mac. & G. 1; *Ex parte* Lawton, 1 K. & J. 204; *Ex parte* Watson, 3 De G. & S. 253; *Ex parte* Wise, 1 Drew. 465.

(*o*) See as to the jurisdiction of the

Court of Chancery to entertain a suit for an account where there was no partnership, trust, or fraud, *Smith v. Leveaux*, 2 DeG. J. & Sm. 1; *Moxon v. Bright*, 4 Ch. 292; *Hemings v. Pugh*, 4 Giff. 456; *Barry v. Stevens*, 31 Beav. 258. See, also, as to claims for mere damages, *Great Western Ins. Co. v. Cunliffe*, 9 Ch. 525; *Duncan v. Luntley*, 2 Mc & G. 30; *Clifford v. Brooks*, 13 Ves. 132.

not yet been decided whether an action in the name of the firm be maintained by or against one of its own members; but the writer sees no difficulty in principle in supporting such an action; the firm being regarded for the purposes of the action as one collective whole. (*p*) This, however, is comparatively an unimportant matter; for if an action in that form cannot be maintained, it is plain that one partner can sue another whenever he has legal or equitable rights to be enforced or adjusted. (*q*)

With respect to actions by or against some partners or members of companies on behalf of themselves and others, it must be borne in mind that suits in this form have long been familiar in courts of equity, and certain rules respecting them have been settled which are not interfered with by the Judicature acts. These rules will be fully investigated presently.

Actions by or  
against some  
on behalf of  
others.

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## SECTION II.—PARTIES TO ACTIONS BETWEEN PARTNERS AND SHAREHOLDERS.

### 1. *General rule as to partnership actions.*

In actions between partners not involving any partnership account or any interference with persons against whom no relief is sought, the general principles applicable to actions generally must be observed. (*r*) But partnership disputes usually involve the taking of some account in which all the partners are interested, or the granting of an injunction or the appointment of a receiver, which materially affects them all. Hence, it has long been a rule in Chancery that where the number of partners is not great they must all be parties to a suit for an account if within the jurisdiction of the court (*s*); and subject to the question how far the firm can be treated as representing them all, this rule is still in force

(*p*) Such actions are common in Scotland.

(*q*) There may, however, still be difficulties in framing an action properly, as in *Robertson v. Southgate*, 6 Ha. 536. In that case there was a partnership of three persons, A, B and C; A retired, B filed a bill against A and C, to set

aside a fraudulent transaction in which the two defendants had concurred; then A & B became bankrupt; it was held that the joint assignees of A & B could not proceed with the suit against C.

(*r*) *Ante*, book i. ch. 3.

(*s*) See *Hills v. Nash*, 1 Ph. 594.

Upon a similar principle, where a creditor of a firm sought payment of his debt out of the estate of a deceased partner, the surviving partners had to be made co-defendants with the executors of the deceased. (t)<sup>1</sup> Probably in this case the firm would now sufficiently represent the survivors.

Action against  
estate of de-  
ceased partner.

It follows from the same principle that to an action for a dissolution and winding up of an ordinary partnership, all the partners within the jurisdiction must be parties (u);<sup>2</sup>

Actions for  
dissolution.

(t) *Wilkinson v. Henderson*, 1 M. & K. 582. This subject will be examined hereafter.

<sup>1</sup> See *ante*, 485, note.

A creditor of an insolvent partnership may properly bring a joint action against the firm's assignee for benefit of creditors, the representatives of a deceased partner, and the surviving partners, to compel the assignee to account and pay over to plaintiff his share of the proceeds of the partnership property and (it being alleged in the complaint that the surviving partners are insolvent), to recover of the representatives the balance of plaintiff's claim. *Haines v. Hollister*, 64 N. Y. 1.

In an action against a wife who is a member of a firm, to subject her interest therein to the payment of a debt of her husband, the other members of the firm are necessary parties. *Westphal v. Henney*, 49 Iowa, 542.

Partnership creditors need not be made parties to an action of settlement between partners. *Gridley v. Conner*, 2 La. Ann. 87.

(u) *Evans v. Stokes*, 1 Keen, 24; *Richardson v. Hastings*, 7 Beav. 301; *Harvey v. Bignold*, 8 ib. 343; *Deeks v. Stanhope*, 14 Sim. 57; *Wheeler v. Van Wart*, 9 ib. 193; *Long v. Yonge*, 2 ib. 369; *Moffat v. Farquharson*, 2 Bro. C. C. 338; *Ireton v. Lewis*, Finch, 96.

<sup>2</sup> *Fuller v. Benjamin*, 23 Me. 255; *Waggoner v. Gray*, 2 Hen. & M. 603; *Gray v. Larrimore*, 2 Abb. U. S. 542; *McKaig v. Hebb*, 42 Md. 227; *Franc's v. Lavine*, 21 La. Ann. 265. See, also,

*Wells v. Strange*, 5 Ga. 22.

So, on a bill by the assignee of a share, for the settlement of a firm accounts, all the partners must be made parties defendant. *Fourth Nat'l Bank v. Carrolton Railroad*, 11 Wall. 624.

Where A and B, partners, sold a stock of goods to C and D, partners, taking their notes for the amount, and D afterwards withdrew from the latter firm, and A became partner with C by purchase, paying for the interest by a receipt against the notes originally given by C and D: *Held*, that B had no interest in this new partnership, and was not entitled to be made a party to a bill by A, for a settlement and account. *Howell v. Harvey*, 5 Ark. 270.

Where A, B and C are in partnership, and C sells all his interest in the property, and credits to D, who takes his place in the firm, and a bill for settlement and account is subsequently filed by B against A and D, C need not be made a party. *Howell v. Harvey*, 5 Ark. 270.

A bill, filed January, 1867, set out a co-partnership between two in the business of lumbering, farming, trade and navigation, from 1815 to 1845, when, one of the co-partners having died intestate, the plaintiffs, being the sole heirs of the deceased member, were admitted into the firm by the surviving partners, whereupon the partnership business continued until 1862; that in 1844, another person was admitted into a particular branch of the partnership business, which continued until 1854, when

and that the representatives of deceased partners must be parties also if they have any interest in the partnership accounts. (v)<sup>3</sup>

he sold out, received from the co-partnership his share of the profits, and accounted for his share of the property, and at the same time the plaintiffs purchased the other partner's interest in this branch of the business; that the general business of the co-partnership continued until 1862, when the original surviving partner died testate, and the defendants were appointed executors of his will; that the plaintiffs claimed an account of all partnership transactions from 1845 to 1862, as well as those prior in 1845. On demurrer: *Held*, 1. That the bill was not multifarious.

2. That the new partner in the particular branch of the partnership business need not be made a party.

3. That the bill was brought by the proper plaintiffs, they suing as partners and not simply as heirs. *Warren v. Warren*, 56 Me. 360.

One of several partners filed a bill against the others to obtain a dissolution, and damages against A, one of the defendants, for false representations, whereby a great loss had accrued to the partners. A decree was rendered against A, and the bill dismissed as to all the others, on a suggestion that the matters of the suit had been adjusted by them: *Held*, that this was erroneous, as one could not be permitted to sue separately, leaving grounds for suits among the rest; nor could he have a decree for damages which belonged to all the partners except A, a suggestion of adjustment being no evidence that the complainant had succeeded to the rights of the others; and as neither A nor any property of his was within the state, the mere joinder of some of the partners with him, as fictitious defendants, could not confer jurisdiction as to him. *Maude v. Rodes*, 4 Dana, 144.

No hearing can be had upon a bill in

equity, founded upon articles of co-partnership, and naming all the partners as defendants, if the return upon the subpoena does not show that all the defendants residing within the State have been duly summoned to answer the bill, although those defendants who have been summoned have appeared and demurred thereto. *Homer v. Abbe*, 16 Gray, 543. See, also, *Stout v. Fortner*, 7 Iowa, 183.

When a suit to dissolve a partnership involves the question whether certain property is the homestead of one partner or partnership property, because bought with firm funds, the wife of such partner is a necessary party. *Rhodes v. Williams*, 12 Nev. 20.

(r) See *Cox v. Stephens*, 9 Jur. N. S. 1144, and 2 N. R. 506; *Baboo Janokey Doss v. Bindabun Doss*, 3 Moo. In App. 175, and *Cawthorn v. Chalie*, 2 Sim. & Stu. 127, where it appears, that a surviving partner will, if necessary, be constituted the legal personal representative of the deceased.

<sup>3</sup> See *Burchard v. Boyee*, 21 Geo. 6.

The surviving partner is a necessary party to a bill in equity brought by the administrator of a deceased partner praying that a previous decree, substantially releasing a partnership debt, may be set aside, and the unpaid balance of the debt decreed to him as administrator. *Wickliffe v. Eve*, 17 How. 468.

The surviving partner is a proper co-defendant to a bill in equity which seeks to enjoin the administrator of a deceased partner from suing the complainant at law, upon notes given in unsettled dealings between complainant and the deceased partner, relating to partnership affairs, and to compel an accounting in respect to those dealings. *Scott v. Scott*, 33 Ga. 102.

A bill by a surviving partner for an

But although in an action for obtaining payment of a proportion of an unascertained sum, all the persons interested in that sum must, as a general rule, be parties, yet, where the sum to be divided is ascertained, and the shares into which it is to be divided are also ascertained, an action for the payment of one of those shares may be maintained without making the persons interested in the other shares parties. (x)<sup>4</sup>

Action for  
share of ascer-  
tained sum.

So, where the account which is sought is one in which the partnership is not concerned, it is not necessary or proper to make all the partners parties. If, therefore, a partner has \*agreed to share his profits with a stranger, and the latter seeks an account of those profits, he should bring his action against that one partner alone, and not make the others parties. (y) Where, however, an equitable mortgagee of a share in a mine which the mortgagor's co-partners had a right to buy brings an action for foreclosure, all the partners ought to be parties. (z)

Sub-partner-  
ship.

\*879

account and to enforce his equities against land owned by the firm, by a sale thereof, and for payment of the balance due him by the administrator, properly joins both the heir and the administrator as defendants. *Dilworth v. Mayfield*, 36 Miss. 40. See, also, *Cannon v. Copeland*, 43 Ala. 201.

Where a part of real estate, belonging to a partnership, was sold by the guardian of the heir of the partner in possession: *Held*, that the administrator of such heir, after his death, was a proper party to a suit in equity by the other partner to recover his share of the proceeds. *McGuire v. Ramsey*, 9 Ark. 518.

Where complainant in chancery, who sues as administrator of a deceased partner, praying an account of partnership concerns, alleges in his bill that he is the sole heir of the deceased partner, the fact that he is not does not make the bill abate for want of necessary parties, since a decree in his favor as administrator would not interfere with the rights of others who might claim a distribution, after the complainant received

the money decreed to him. *Moore v. Huntington*, 17 Wall. 417.

Where a partner in a right of pre-emption to a lot of land neglects or refuses to join his co-partner in obtaining an allowance of their claim, his heirs cannot come into equity for a division of such lot after such co-partner has secured it all to himself. *Farber v. Levi*, 1 Morr. (Iowa), 372.

(x) See *Weymouth v. Boyer*, 1 Ves. J. 416; *Smith v. Snow*, 3 Madd. 10. Compare *Hills v. Nash*, 1 Ph. 594.

<sup>4</sup>A bill in equity by one partner against one of his three co-partners to recover one-fourth of \$3,211, alleged to have been gotten by the latter three by mistake in the dissolution settlement, is demurrable for non-joinder of the two other partners. *Johnston v. Preer*, 51 Ga. 313.

(y) *Brown v. De Tastet*, Jac. 284, Raymond's case, cited by Lord Eldon in *Ex parte Barrow*, 2 Rose, 255; *Bray v. Fromont*, 6 Madd. 5, and see *Killock v. Greg*, 4 Russ. 285.

(z) *Redmayne v. Forster*, 2 Eq. 467.

Again, if a person has been induced by the fraud of the defendant to purchase shares from him, he is entitled to bring an action for a return of the purchase money, and for an indemnity, and the only necessary party to such an action is the person who sold the shares. (*a*)

Shares purchased on the faith of false statements.

Again, where persons have been induced by fraud to subscribe to a bubble company, each one may institute an action on his own behalf against those who have fraudulently obtained his money, for a return thereof; and in such a case it is not necessary that the other persons defrauded should be parties to the action, or be represented therein. (*b*)

Bubble companies.

With reference to the question of parties to actions for the rescission of contracts on the ground of fraud,<sup>1</sup> the case of *Macbride v. Lindsay* (*c*) is of considerable importance. There the plaintiff had been induced by the fraudulent representations of the directors of a chartered company to become a member of the company, and he filed a bill against the company and its directors, praying for, amongst other things, a return of all moneys paid by him to the company, with interest, and for an injunction to restrain the making of further calls upon him, and for an

Fraud not on plaintiff alone.

(*a*) See *Stainbank v. Fernley*, 9 Sim. 556; *Mare v. Malachy*, 1 M. & Cr. 559; *Turner v. Hill*, *Turner v. Tyacke*, *Turner v. Borlase*, 11 Sim. 1, 16, 17.

(*b*) *Colt v. Woollaston*, 2 P. W. 154; *Green v. Barrett*, 1 Sim. 45; *Blain v. Agar*, 2 Sim. 289; *Cridland v. De Mauley*, 1 DeG. & S. 459.

<sup>1</sup> In an action by a partner against his co-partner to obtain a dissolution of the partnership, on the ground of a fraudulent sale of the property of the partnership by the latter, it is proper to make the fraudulent vendee a party. *Webb v. Helion*, 3 Robt. 625.

Where suit is brought by one of two partners against the other, to obtain an accounting and payment of a balance justly due from the defendant to the plaintiff, and to set aside as fraudulent a release from liability as such partner, executed by the plaintiff to the defendant, a third person who has fraudulently and without consideration obtained

from the defendant portions of the partnership property, may also be made a party, in order to subject the property so held by him to the payment of any balance due from the defendant to the plaintiff. *Wade v. Rusher*, 4 Bosw. 537.

Upon a bill for an account alleging that complainant sold his interest in a firm to one of the members thereof for less than its value, through fraud of the vendee, and that the firm has been dissolved, the third partner cannot be made a party defendant, as no decree can be rendered against him. *Hirsch v. Adler*, 21 Ark. 338.

One partner who brings his bill for relief against a note fraudulently obtained, should join as defendant his co-partner who participated in the fraud on him. *Williams v. Nicholson*, 25 Ga. 560.

(*c*) 9 Ha. 574. See, also, *Seddon v. Connell*, 10 Sim. 58.

indemnity against any liability in respect of the engagements of the company. A demurrer to this bill was allowed, on the ground that the fraud of which the plaintiff complained gave him no right to rescind his contract, except \*a right common to \*880 himself and others who were not represented in the suit.

This case appears to the writer extremely difficult to reconcile with others in which false prospectuses have been issued, but in which nevertheless one shareholder has successfully maintained a suit against a company and its directors for a rescission of his contract to take shares. (*d*)

Observations  
on Macbride v.  
Lindsay.

Whether in an action against the executor of a partner for an account for profits made by wrongfully employing the assets of the deceased in the business of a firm of which the executor is a member, it is necessary to make the other members of the firm parties, is not always easy to decide. The rule appears to be that they are necessary parties if the account sought is an account of all the profits made by the use of the capital of the deceased; but not if the account is confined to so much of those profits as the executors have themselves received. (*e*)

Actions  
against execu-  
tors for ac-  
count of profits.

Although a person may have no interest in the account to be taken, and would therefore be an improper party to an action confined to such account, yet if an injunction is sought to be obtained against him specially, he must be made a party. For this reason, the bank of England and Sheriffs are often made parties to actions in which they have no real interest. (*f*)

Effect of pray-  
ing injunction.

## 2. *Where some partners may sue or be sued on behalf of themselves and others.*

It has been held in many cases, that to a bill praying for a dissolution of a partnership, all the partners, however numerous, are necessary parties,<sup>1</sup> and that consequently

Some on behalf  
of themselves  
and others.

(*d*) See, for example, *Kisch v. Central Railway of Venezuela*, 3 DeG. J. & Sm. 122, and *Smith v. Reese River Co.* 2 Eq. 264, noticed *infra*, under the head Rescission of Contract. As to actions in such cases by one shareholder on behalf of himself and others, see *Croskey v. Bank of Wales*, 4 Giff. 314, noticed *infra*, p. 889. *Macbride v. Lindsay*, on the one hand, and *Croskey v. Bank of*

*Wales*, on the other, are certainly embarrassing.

(*e*) See *Vyse v. Foster*, 8 Ch. 309, and *L. R. 7 H. L. 318*; *Simpson v. Chapman*, 4 DeG. M. & G. 154. Compare *McDonald v. Richardson*, 1 Giff. 81.

(*f*) See, for example, *Vulliamy v. Noble*, 3 Mer. 593; *Bevan v. Lewis*, 1 Sim. 376.

<sup>1</sup>In an action for an injunction, and a

a bill filed by some on behalf of themselves and others, and  
 \*881 praying for a \*dissolution, is bad on demurrer. (*g*) This rule is supposed to admit of no exception, and it has, though with expressions of regret, been held to apply to unincorporated companies as well as to ordinary partnerships. (*h*) The reason given for the rule is, that the affairs of a partnership cannot be finally wound up and settled without deciding all questions arising between all the partners, which cannot be done in the absence of any one of them. (*i*)

Even if a partnership is empowered to sue and be sued by a public officer, his presence is not, in an action for a dissolution, equivalent to the presence of all the partners. (*k*)

But notwithstanding these numerous authorities, it may be permitted to doubt whether it can be considered as a rule admitting of no exception whatsoever, that to every action for a dissolution, all the partners must individually be parties. All that can on principle be requisite, is that every conflicting interest shall be substantially represented by some person before the court. If, which is possible, the interest of each partner conflicts with that of all the others, then all must undoubtedly be parties. But if the partners are numerous, and it can be shown that they are divisible into classes, and that all the individuals in each class have a common interest, then although the interest of each class conflicts with that of every other class, there seems to be no reason why, if each class is represented by one or two individuals composing it, a decree for a dissolution should not be

receiver to close the business of a special partnership formed under the statute, on the ground of insolvency, it is necessary to bring before the court, as parties, all who have an interest to have the members of the firm retain control of the assets. Where one of the special partners, is deceased, his executors or administrator should be joined as defendants. Especially should they be brought in where the decedent had covenanted that the partnership should continue for a term of years. *Walkenshaw v. Perzel*, 4 Robt. (N. Y.) 426; 32 How. Pr. 233.

(*g*) *Evans v. Stokes*, 1 Keen, 24; *Richardson v. Hastings*, 7 Beav. 301; *Harvey*

*v. Bignold*, 8 ib. 343; *Deeks v. Stanhope*, 14 Sim. 57; *Wheeler v. VanWart*, 9 Sim. 193; *Long v. Yonge*, 2 Sim. 369; *Ireton v. Lewis*, Finch, 96; *Moffat v. Farquharson*, 2 Bro. C. C. 338.

(*h*) See cases in last note and *VanSandau v. Moore*, 1 Russ. 441; and *Davis v. Fisk*, in *Farren on Life Assurances*, and cited by counsel in *Younge's Reports*, p. 425.

(*i*) See *Richardson v. Hastings*, 7 Beav. 307.

(*k*) See *Van Sandau v. Moore*, 1 Russ. 441; *Davis v. Fisk*, cited in *You.* 425; *Abraham v. Hannay*, 13 Sim. 581; *Seldon v. Connell*, 10 Sim. 58.

made. (*l*) There is not, \*however, so far as the writer is aware, \*882 any case in which a decree for a dissolution has actually been made in the absence of any of the partners.

In an action not claiming a dissolution, the question of parties turns entirely on the nature of the right sought to be enforced. If an account is required, and it is one in Action not in terms seeking a dissolution. which the interest of *each* partner is distinct from and in conflict with that of *all* the others, then all the partners, however numerous, must be parties, and their representation by others, or by a public officer or secretary, will not be sufficient. (*m*) On the other hand, if there are no such conflicting interests as above supposed, it will be sufficient if each distinct interest is represented by a party to the record. (*n*)

It was held in *Walworth v. Holt* (*o*), that where partners are too numerous to be brought before the Court, and they are Walworth v. Holt. divisible into classes, and all the individuals in one class have a common interest, a suit instituted by a few individuals of that class on behalf of themselves and all the other individuals of the same class against the other members of the company, is sustainable. Since this decision, there have been many suits by some shareholders on behalf of themselves and others, praying for very general accounts (but studiously avoiding a prayer for a dissolution), and such suits have been successful whenever the interest of the absent partners has been the same as that of the plaintiffs on the record.

For example, it was held in *Apperley v. Page* (*p*), that a bill might be filed by some of the shareholders of a provisionally registered railway company on behalf of Apperley v. Page.

(*l*) See *Richardson v. Larpent*, 2 Y. & C. C. 514, and the observations of Lord Cottenham in *Walworth v. Holt*, 4 M. & Cr. 635. As to *Cockburn v. Thompson*, 16 Ves. 321, see the obs. of V.-C. Shadwell, 2 Sim. 380, and observe that the real object was to make the defendants account for the money they had received, and that the question as to want of parties was not raised with reference to that part of the prayer of the bill which sought a dissolution.

(*m*) See *Van Sandau v. Moore*, 1 Russ. 441; *Selddon v. Connell*, 10 Sim. 58;

*Abraham v. Hannay*, 13 ib. 581; *McMahon v. Upton*, 2 ib. 473; *Sibley v. Minton*, 27 L. J. Ch. 53.

(*n*) Comp. *Harrison v. Brown*, 5 DeG. & Sm. 728.

(*o*) 4 M. & Cr. 619. *Cockburn v. Thompson*, 16 Ves. 321, is an earlier decision on this point. See, too, *Good v. Blewitt*, 13 Ves. 397. See, as to some on behalf, &c., in cases of voluntary societies assuming to be corporations, *Lloyd v. Loaring*, 6 Ves. 773.

(*p*) 1 Ph. 779. Compare *Sibson v. Edgeworth*, 2 DeG. & Sm. 73.

themselves and all the other shareholders, except the defendants, against the directors; although the bill prayed not only for the collection of the joint property and its application in discharge \*883 of the \*joint liabilities, but also for the distribution of the surplus amongst the shareholders. (*q*)

When no dissolution is claimed, and no winding up of the partnership is sought, an action may be properly instituted by some of a number of numerous partners, on behalf of themselves and all others whose interest is identical with their own; and this form of action is constantly adopted where numerous partners seek to make their managers account for secret benefits and advantages obtained by them in breach of the good faith owing to those whose affairs they conduct (*r*); or to rescind contracts into which the partnership has been induced to enter by false and fraudulent representations. (*s*) So in the case of mutual insurance societies and friendly societies, one member may sue the trustees or committee and one of each class of members as representing all the other members, where the object of the action is to obtain payment of what is due to the plaintiff. (*t*)

Again, for the purpose of rescinding an agreement illegally entered into by the directors of an unincorporated company, or for the purpose of restraining them from doing that which is illegal, an action may be instituted by one shareholder on behalf of himself and all the others, except the defendants, against those directors. Thus in *Gray v. Chaplin* (*u*), it was held that one of the shareholders of a company was entitled to file a bill on behalf of himself and other shareholders, to set aside an agreement entered into by the managers, contrary to the company's act of Parliament; because whatever benefits might be reserved to the shareholders by the agreement, they

Actions not  
seeking divi-  
sion of assets.

Actions to  
restrain direc-  
tors from im-  
proper acts.

(*q*) See, for other instances, *Cramer v. Bird*, 6 Eq. 143; *Wilson v. Stanhope*, 2 Coll. 629; *Harvey v. Collett*, 15 Sim. 332; *Cooper v. Webb*, *ib.* 454; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew, 684; *Richardson v. Hastings*, 7 Beav. 323; *Butt v. Monteaux*, 1 K. & J. 98; *Shepard v. Oxenford*, *ib.* 491; *Sibson v. Edgeworth*, 2 DeG. & S. 73. Compare *Williams v. Salmond*, 2 K. & J. 463.

(*r*) *Chancey v. May*, Prec. in Ch. 592;

*Hichens v. Congreve*, 4 Russ. 562; *Taylor v. Salmon*, 4 M. & Cr. 134; *Beck v. Kantorowicz*, 3 K. & J. 237.

(*s*) See *Small v. Attwood*, You. 407.

(*t*) See *Pare v. Clegg*, 29 Beav. 589; *Bromley v. Williams*, 32 *ib.* 177; *Harvey v. Beckwith*, 2 Hem. & M. 429.

(*u*) 2 Sim. & Stu. 267, reversed on appeal, on the ground of delay and acquiescence, 2 Russ. 126.

\*were all to be considered as interested in having the directions of the act complied with. \*884

Where a company is incorporated, and its directors or some shareholders have done or are doing that which other shareholders disapprove, and bring an action to redress or prevent, the following rules are to be observed:—

Where company is incorporated.

1. If the matter complained of is one which gives a right of action to the company as a collective whole, the company ought to sue in its corporate name, and an action by one member on behalf of himself and others is improper. (*x*)

2. Again, if the complaint relates to some matter of internal management as to which a majority is competent to decide, the action should be brought by the majority in the name of the company. (*y*)

3. But if those who have the management of the affairs of the company will not bring an action in its name when the shareholders require it, having a right so to do, or if directors or shareholders have done or are about to do that which is wrong, even if sanctioned by a majority, then an action by some of the members on behalf of themselves and others may be sustained; for otherwise the dissentients would be without redress. (*z*) In suits thus constituted, courts of equity have compelled directors to account for moneys improperly applied (*a*); have declared resolutions fraudulent and void (*b*); have restrained the carrying out of agreements under the seal of the company (*c*); restrained the application of the funds of a company to unauthorized purposes (*d*), *e.g.*, defraying the expense of applications to Parliament (*e*); restrained the \*construction \*885

(*x*) *Gray v. Lewis*, 8 Ch. 1035; *Russell v. Wakefield Waterworks Co.* 20 Eq. 474.

(*y*) *McDougall v. Gardiner*, 1 Ch. D. 13; *Mozley v. Alston*, 1 Ph. 790; *Foss v. Harbottle*, 2 Ha. 461.

(*z*) See the last two notes and the cases *infra*. See *Duckett v. Gover*, 6 Ch. D. 82, where the plaintiff was allowed to amend by adding the company as a plaintiff under Order xvi., Rule 2. This case is important, as the plaintiff had no authority from the company to use its name.

(*a*) *Bryson v. Warwick Canal Co.* 4 DeG. M. & G. 711.

(*b*) *Preston v. Grand Collier Dock Co.* 11 Sim. 327.

(*c*) *Maunsell v. Midland Great Western (Ireland) Rail. Co.* 1 Hem. & M. 130.

(*d*) *Colman v. Eastern Counties Rail. Co.* 10 Beav. 1; *Salomons v. Laing*, 12 Beav. 339 and 377; *Munt v. Shrewsbury and Chester Rail. Co.* 13 Beav. 1; *Bagshaw v. Eastern Union Rail. Co.* 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51; *Vance v. East Lancas. Rail. Co.* 3 K. & J. 50.

(*e*) See the last two cases, and *Lyde v. East Bengal Rail. Co.* 36 Beav. 10.

of part of a railway instead of the whole of it (*f*); restrained the improper declaration of dividends (*g*); set aside an improper forfeiture of shares (*h*); restrained the transfer of the business of one company to another company (*i*); set aside agreements for such transfer (*k*); set aside fraudulent purchases (*l*); restrained loans to directors (*m*); restrained a division of assets amongst a majority of members to the exclusion of the rest. (*n*)

An action by one member on behalf of himself and others may even be maintainable, where an action with like objects would fail if instituted by the company in its corporate capacity; *e. g.*, where the complaint is of fraud imputable to the company as a body, but not imputable to the members individually. (*o*)

In such cases as the foregoing, the company, as such, is a proper party, because it is the company as such which is sought to be affected by the judgment of the Court (*p*); and the directors individually are proper parties, because they are the persons to be affected in the first instance, and some judgment against them personally is also usually necessary. If, however, a judgment against the company is all that is required, there is no necessity to make the directors parties individually.

Thus, where a suit was instituted for the purpose of preventing a company from delegating its powers and, in fact, transferring its business to another company, a bill by one of the shareholders in the first company, on behalf of himself and all the other shareholders therein, against both companies, was held

(*f*) *Cohen v. Wilkinson*, 12 Beav. 125, and 1 Mac. & G. 481. *Hodgson v. Powis*, 12 Beav. 392 and 529, and 1 DeG. M. & G. 6.

(*g*) *Bloxam v. Metropolitan Rail. Co.* 3 Ch. 337; *Hoole v. Great Western Rail. Co.* ib. 262; *Dumville v. Birkenhead, &c., Rail. Co.* 12 Beav. 444; *Carlisle v. South-Eastern Rail. Co.* 1 Mac. & G. 689; *Henry v. Great Northern Rail. Co.* 4 K. & J. 1, and 1 DeG. & J. 606. As to actions to restrain the payment of dividends actually declared, see *infra*, p. 888.

(*h*) *Sweny v. Smith*, 7 Eq. 324.

(*i*) *Beman v. Rufford*, 1 Sim. N. S. 550; *Charlton v. Newcastle and Carlisle*

*Rail. Co.* 5 Jur. N. S. 1096; *Hare v. London and N.-W. Rail. Co.* 1 J. & H. 252, which shows that the company which has agreed to take the business ought to be a party.

(*k*) *Clinch v. Financial Corp.* 5 Eq. 450, and 4 Ch. 117.

(*l*) *Atwool v. Merryweather*, 5 Eq. 464, note.

(*m*) *Bluck v. Mallaloe*, 27 Beav. 398.

(*n*) *Menier v. Hooper's Telegraph Co.* 9 Ch. 350.

(*o*) See the observations of Lord Cottingham in *Vigers v. Pike*, 8 Cl. & Fin. 647, 648.

(*p*) See *Bagshaw v. The Eastern Union Rail. Co.* 7 Ha. 114.

proper in point of form, although none of the directors of either company were parties in person. (*q*)

The cases above referred to show that it is competent for one shareholder to institute an action on behalf of himself and co-shareholders, for the purpose of obtaining relief in respect of illegal acts done or contemplated by directors; moreover, an action in this form is sustainable to prevent or set aside a transaction which is a fraud by a majority on a minority (*r*); but courts will not interfere in actions so constituted, if the relief sought is in respect of acts, the legality or illegality of which depends on the voice of a majority of the shareholders, who are not themselves chargeable with fraud. (*s*) If such last-mentioned acts are sanctioned by the majority, the Court cannot interfere at all, and if they are not so sanctioned, the majority should themselves apply to the Court, and institute proceedings in the name of the company. (*t*) If it is thought necessary to bring an action before the views of the majority are known, or if the majority are too indifferent to take any proceedings to enforce obedience to their own resolutions, the proper course to be taken by those who determine to appeal to the Court is to take upon themselves the responsibility of bringing an action in the name of the company. Such an action will not be stayed unless it appears that the majority disapprove it. (*u*)

Actions by some on behalf to control a majority.

\*When an action is brought by some shareholders on behalf of themselves and others, it should appear in the statement of claim, (1), that the plaintiffs are shareholders (*x*); and, (2), that they are suing on behalf of themselves

\*887  
Frame of action by some on behalf, &c.

(*q*) *Winch v. The Birkenhead, Lanc. and Chesh. Rail. Co.* 5 DeG. & Sm. 562.

(*r*) *Atwool v. Merryweather*, 5 Eq. 464; *Menier v. Hooper's Telegraph Co.* 9 Ch. 350.

(*s*) *McDougall v. Gardiner*, 1 Ch. D. 13; *Russell v. Wakefield Waterworks Co.* 20 Eq. 474; *Foss v. Harbottle*, 2 Ha. 461; *Mozley v. Alston*, 1 Ph. 790; *Lord v. The Governor and Co. of Copper Miners*, 2 Ph. 740; *Bailey v. The Birkenhead, Lancas., and Cheshire Junction Rail. Co.* 12 Beav. 433; *Browne v. The Monmouthshire Rail. and Canal Co.* 13 Beav. 32; *Kent v. Jackson*, 14 Beav. 367, and 2 DeG. M. & G. 49; *Inderwick v. Snell*, 2 Mac. & G. 216; *Ed-*

*wards v. The Shrewsbury and Birm. Rail. Co.* 2 DeG. & Sm. 537; *Yetts v. The Norfolk Rail. Co.* 3 ib. 293; *Stevens v. The South Devon Rail. Co.* 9 Ha. 313. See *infra*, p. 895, *et seq.*

(*t*) *McDougall v. Gardiner*, 1 Ch. D. 13; *Mozley v. Alston*, 1 Ph. 790.

(*u*) *The Exeter and Crediton Rail. Co. v. Buller*, 5 Ra. Ca. 211, where the bill was filed in the name of the company, although the defendants had possession of the seal. See, also, *East Pant du, &c., Mining Co. v. Merryweather*, 2 Hem. & M. 254; *Atwool v. Merryweather*, 5 Eq. 464.

(*x*) *Banks v. Parker*, 16 Sim. 176; *Walburn v. Ingilby*, 1 M. & K. 61.

and others. If this last does not appear, the action will be treated as that of the ostensible plaintiffs alone. (*y*) But any one shareholder can, it is said, maintain an action against a company to restrain an illegal act (*z*); and if a plaintiff sues alone when he ought to sue on behalf of himself and others, an amendment would probably be allowed.

Moreover, if there are conflicting interests, care must be taken to have each separate interest substantially represented by some person who is a party to the action. (*z*)

Therefore, where there is a dispute about a call which some shareholders have paid and others have not, those who have not paid cannot sustain an action on behalf of themselves and those who have paid, against the directors, trustees, and secretary of the company, for a general account of the partnership debts and assets, and to have the property of the concern applied in discharge of its liabilities. To an action with such objects, some at least of the class of shareholders who have paid the call ought to be made parties. (*a*) Again, with respect to actions

to restrain the improper payment of a dividend, it is to be remembered that the declaration of a dividend confers on each shareholder a legal title to his share of it; and, consequently, even although the dividend may have been improperly declared, payment of it will not be restrained in an action by one

shareholder against the company and its directors only. On these grounds, in *Carlisle v. South-Eastern Railway Company*, an injunction to restrain the payment of a dividend already declared was refused, although an injunction to restrain the future declaration of dividends, except out of profits, was granted. (*b*)

These cases are sufficient to show that, in order that an action may be sustainable by one or more persons on behalf of themselves and others, it is essential that the inter-

(*y*) *Baldwin v. Lawrence*, 2 Sim. & Stu. 18; *Cooper v. Powis*, 3 DeG. & S. 688.

(*z*) See *Hoole v. Great Western Rail. Co.* 3 Ch. 262.

(*a*) See *Richardson v. Larpent*, 2 Y. & C. C. 507; *Lovell v. Andrew*, 15 Sim. 581; *Sharpe v. Day*, 1 Ph. 771; *Lund v. Blanshard*, 4 Ha. 9; and see *Seddon v. Connell*, 10 Sim. 58, and *Abraham v. Hannay*, 13 ib. 581, as to the insufficiency of the public officer in such

cases. If the plaintiff does not know who they are, see *Hodgkinson v. National Live Stock Insurance Co.* 26 Beav. 473, and 4 DeG. & J. 422.

(*b*) *Carlisle v. South Eastern Rail. Co.* 1 Mac. & G. 689. See, also, *Fawcett v. Laurie*, 1 Dr. & Sm. 192. Compare *Hoole v. Great Western Rail. Co.* 3 Ch. 262, where one of the defendants was held sufficiently to represent others in the same interest.

ests of the plaintiffs on the record, and of those others whom they assume to represent, should be, in a judicial point of view, identical, and be proved to be so by the plaintiffs. (c) Consequently a shareholder in a company who has sold his shares, and has no longer any interest in the company, cannot sustain an action on behalf of himself and the other shareholders for an account of the dealings and transactions of the company or of its directors, and to have its assets applied in discharge of its liabilities. For, whether he is or is not still under liabilities from which he is entitled to be freed, he has no right, having sold all his interest in the company, to assume to represent those with whom he has no longer anything to do. (d) Upon the same principle it has been said, that a shareholder who is a mere trustee, having no beneficial interest in the company, is not a proper person to sue on behalf of himself and other shareholders. (e)

Neither can an action by one shareholder on behalf of himself and others be maintained by a person who does not honestly represent the interests of his co-shareholders, but who is the nominee of a rival company. (f) A bill by such a \*plaintiff has even been taken off the file. (g) But \*889 the mere circumstance that the plaintiff has bought a share recently to enable himself to bring an action, does not warrant the Court in dismissing it. (h)

It was at one time considered that a suit by one person on behalf of himself and others was not sustainable unless the injury of which he complained was such as to give him Joint right of action. and them a right to sue jointly, and that it was not sufficient that each should have a right to sue separately: and accordingly it was

(c) See, further, *Ward v. Sittingbourne and Sheerness Rail Co.* 9 Ch. 488; *Clay v. Rufford*, 8 Ha. 281; *Williams v. Salmond*, 2 K. & J. 463; *Sibson v. Edgeworth*, 2 DeG. & S. 73; in which case the defendant pleaded that the interests of the plaintiff and those he assumed to represent, were not identical. See, also, *Thomas v. Hobler*, 4 DeG. F. & J. 199; which shows that if the plaintiff makes an alternative case, neither alternative must be opposed to the interests of those whom he assumes to represent.

(d) *Doyle v. Muntz*, 5 Ha. 509.

(e) *Ibid. sed quere.*

(f) *Forrest v. Manchester, &c. Rail. Co.* 4 DeG. F. & J. 126. See, also, *Hare v. London and North Western Rail. Co.* 1 J. & H. 272, and *Thomas v. Hobler*, 4 DeG. F. & J. 199.

(g) *Robson v. Dodds*, 8 Eq. 301.

(h) *Bloxam v. Metropolitan Rail. Co.* 3 Ch. 337; *Seaton v. Grant*, 2 Ch. 459. See, further, on this subject, *Orr v. Glasgow, &c. Rail. Co.* 3 McQu. 799; *Rogers v. Oxford, &c. Rail. Co.* 2 DeG & J. 662.

held that where persons having no previous connection with each other had been induced to subscribe to a loan or for shares in a company by fraud, a suit by one of them on behalf of himself and others to obtain a return of their subscriptions could not be sustained; for although each subscriber was entitled to have his money back, the subscribers had no joint right of action. (*i*) But in another case the contrary was decided (*k*); it being considered that the subscribers to a company had such a community of interest in the funds subscribed as to entitle them to sue jointly for their return. (*l*) Practically this point is not now of much importance, owing to the modern rule as to mis-joinder of plaintiffs. (*m*)

Actions for recovery of subscriptions in cases of fraud.

An action by one or more persons on behalf of themselves and others, may be instituted without the consent of such others (*n*); and even against their consent if the object of the action is to prevent or obtain redress in respect of an illegal act. (*o*) But an action by one or more on behalf, etc., is the \*action of those who are named on the record as plaintiffs, and whatever is a defense as against them is a defense to the action, whatever might have been the case if other persons had been plaintiffs on the record. (*p*)

Further observations on actions by some on behalf.

Where an action is instituted by one member of a company on behalf of himself and others for the protection of the funds of the company and the action is successful, the plaintiffs are only entitled to their costs as between party and party, although in one sense the funds out of which those costs are to be paid belong to the plaintiffs themselves. (*q*)

(*i*) *Jones v. Garcia del Rio*, Turn. & Russ. 297; *Croskey v. Bank of Wales*, 4 Giff. 314. See, also, *Hallows v. Fernie*, 3 Ch. 467.

(*k*) See *Beeching v. Lloyd*, 3 Drew. 314, where the demurrer was overruled. This case, although prior to *Croskey v. Bank of Wales*, was not cited in it.

(*l*) See the last note.

(*m*) See *infra*, p. 890.

(*n*) *Burt v. British Nation Assur. Co.* 5 Jur. N. S. 555, affirmed on appeal, 4 DeG. & J. 158; *Williams v. Salmond*, 2 K. & J. 463.

(*o*) *White v. Carmarthen Rail. Co.* 1 Hem. & M. 786. See, also *Bloxam v. Metropolitan Rail. Co.* 3 Ch. 337. Compare *Lund v. Blanshard*, 4 Ha. 299.

(*p*) *Burt v. British Nation Insur. Co.*, *ubi supra*, where the plaintiff was held barred by his own acquiescence in the matters complained of. See, too, *Scarth v. Chadwick*, 14 Jur. 300, where the defendants got rid of the suit by paying the plaintiff all that he was entitled to.

(*q*) *Morgan v. Great Eastern Rail. Co.* 1 Hem. & M. 560.

Accounts taken in an action by one shareholder on behalf of himself and others bind all of them. (*r*)

It seems that unless there are twenty persons at least whose interests are the same, one or more of them will not be allowed to represent the others. (*s*)

Before quitting this part of the subject, it is necessary to notice the important rule relating to the misjoinder of parties. Formerly, if a bill was filed by some on behalf of <sup>Misjoinder of</sup> plaintiffs themselves and others, and it turned out that any of the persons thus included as plaintiffs had no right to sue, or had interests conflicting with that of the plaintiffs on the record, the bill was dismissed (*t*); but now the Court has power to grant relief and to modify its decree according to the special circumstance of the case, and for that purpose to direct amendments, and to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants to the action, and the remaining plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record. (*u*). Accordingly if an action is brought by one shareholder on behalf of himself and others, \*and it appears that the interest \*891 of some of the persons thus represented is different from that of the plaintiff, the action may nevertheless be sustained. (*x*)

### 3. *Of actions by and against public officers.*

Upon the ground that the public officer of a company only represents the shareholders as a collective whole, and not <sup>Representation</sup> any one or more of them as against the others (*y*), it <sup>of parties by</sup> public officers. was twice held by Lord Eldon, that a suit for the dissolution of a company empowered to sue and be sued by its secretary was defective for want of parties, although the suit was instituted by one shareholder on behalf of himself and others, against the secretary and the directors of the company. (*z*) In tracing the history of

(*r*) See *Singleton v. Selwyn*, 9 Jur. N. S. 1149.

(*s*) See *Harrison v. Stewardson*, 2 Ha. 530; But see *Fripp v. Chard Rail. Co.* 11 Ha. 258.

(*t*) In *Spittal v. Smith*, Tam. 45; the bill was dismissed as to some of the plaintiffs only.

(*u*) See Ord. xvi. r. 13, and 15 and 16

Vict. c. 86, § 49.

(*x*) *Hallows v. Fernie*, 3 Ch. 467; *Jones v. Rose*, 4 Ha. 52. See, too, *Clements v. Bowes*, 1 Drew, 684; *Sturge v. The Eastern Union Rail. Co.* 7 DeG. M. & G. 180, 181.

(*y*) See *ante*, p. 873.

(*z*) *Davis v. Fisk*, cited in You. 425; and *Van Sandau v. Moore*, 1 Russ. 441.

joint-stock companies in the celebrated case of *Van Sandau v. Moore*, Lord Eldon prominently alluded to the inability of a public officer to represent the company in suits between its members (*a*), and this doctrine was carried out to its full extent by the late Vice-Chancellor Shadwell (*b*) who held (*c*) that neither the act of 7 Geo. 4, c. 46, nor the subsequent act of 1 & 2 Vict. c. 96, empowered the public officer to represent all the members of the company except one, in a suit between him and them as members. But notwithstanding these authorities an action may be instituted by the public officer of a company against some of its members, if the question in dispute is one between the company as a collective whole, on the one side, and those individual members on the other; and it has accordingly been held that, under the Joint-stock banking act, 7 Geo. 4, c. 46, it is competent for a public officer of a company governed by that act, to sue the directors of the company for the purpose of making them account for breaches of trust and mismanagement; and in such an action none of the shareholders need be parties, although the company has ceased to carry on business, except for the purpose of winding up its affairs. (*d*) So the public officer is the proper person to sue a shareholder for calls made payable by him to the company. (*e*)

#### 4. *Actions by and against incorporated companies.*

An incorporated company can only sue and be sued in its corporate name; and this rule applies as much to actions by and against its own members as to actions by and against other persons. Accordingly it has been held that a registered joint-stock company can support an action against one of its own shareholders for damages for a libel on the company

Actions between incorporated companies and their members.

(*a*) See 1 Russ. 460 and 472, and *Hichens v. Congreve*, 4 Russ. 562.

(*b*) In *McMahon v. Upton*, 2 Sim. 473; *Seddon v. Connell*, 10 Sim. 58; *Abraham v. Hannay*, 13 Sim. 581.

(*c*) In *Seddon v. Connell*, 10 Sim. 58.

(*d*) *Harrison v. Brown*, 5 DeG. & Sm. 728.

(*e*) See, as to banking companies governed by 7 Geo. 4, c. 46; *Chapman v. Milvain*, 5 Ex. 61, removing the doubt 1168

expressed in *Hughes v. Thorpe*, 5 M. & W. 656. See, too, *Ex parte Hall*, 3 Deac. 405. As to other companies, see *Lawrence v. Wynn*, 5 M. & W. 355; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Wills v. Sutherland*, 4 Ex. 211, affirmed in error, 5 Ex. 715, in each of which an action for calls by a public officer was successful. See, too, *Smith v. Goldsworthy*, 4 Q. B. 430; *Reddish v. Pinnock*, 10 Ex. 213.

published by him. (*f*) A shareholder of an incorporated company may be a creditor of or debtor to the company, just as if he were not a member of it. It follows from this that he may not only sue it, but having obtained judgment against it, he may execute that judgment against his co-shareholders, if they are liable to be proceeded against in that way by ordinary creditors. Moreover, a court will not interfere at the instance of the shareholders proceeded against, and stay execution against them, either on the ground that the plaintiff is himself a member of the company, and bound therefore to contribute to his own payment, or upon the ground that the rights of the parties cannot be ascertained without taking the accounts of the company. In the case supposed the plaintiff is a creditor of the company, and not the less so for being a shareholder in it; and to deprive him of his rights as a creditor would be to \*defeat one of the objects for which the \*893 company, as such, has any existence. (*g*) But one shareholder will not be allowed to buy up and put in force against a co-shareholder a debt of the company, if the object of the execution creditor is to obtain by means of that debt payment of other monies to which he is not justly entitled. (*h*)

The cases in which some of the members of an incorporated company can sue or be sued on behalf of themselves and others have been already considered. (*i*)

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### SECTION III.—CASES IN WHICH COURTS WILL NOT INTERFERE BETWEEN PARTNERS AND MEMBERS OF COMPANIES.

There are three general rules by which courts of equity were influenced when their interference was sought by one partner against another, and to which it will be convenient at once to refer; for it is apprehended that the same rules will be observed by all divisions of the High Court in all actions which before the Judicature acts would have been suits in equity; in other words, in all actions for specific performance,

General rules  
as to interference  
between  
partners.

(*f*) *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87.

(*g*) See *Rheam v. Smith*, 2 Ph. 726; *Hardinge v. Webster*, 1 Dr. & Sm. 101.

(*h*) *Woodhams v. Anglo-Australian, &c. Co.* 2 DeG. J. & Sm. 162, and other cases referred to at the end of this section.

(*i*) *Ante*, p. 884.

for an account, for a receiver, for an injunction, and in those actions for fraud in which equitable relief as distinguished from the simple recovery of damages is sought. The rules in question, however, have no application to cases in which prior to the Judicature Acts one partner could have sued another at law. The rules alluded to are, 1, not to interfere except with a view to dissolve the partnership; 2, not to interfere in matters of internal regulation; 3, not to interfere at the instance of persons who have been guilty of laches.

\*894 \*1. *Of the rule not to interfere except with a view to a dissolution.*

Formerly courts of equity were averse to interfering at all between one partner and another, unless it was for the purpose of dissolving the partnership; or, if it was dissolved already, of finally winding up its affairs. Hence it will be found on reference to the older reported decisions, that if a dissolution was not sought, the Court would not decree a partnership account,<sup>1</sup> nor restrain a partner from infringing the partnership articles, nor protect the partnership assets from destruction or waste. This rule, at no time perhaps very inflexible, has gradually been relaxed; it having been discovered to be more conducive to justice to interfere to prevent some definite wrong, or to redress some particular grievance, than to decline to interfere at all unless complete justice can be done by winding up the partnership, and in that manner settling all disputes. At the same time so difficult is it to shake off old associations, and to run counter to established rules, that traces of the aversion alluded to may yet be found in the decisions of the courts, and especially in those which relate to the specific performance of agreements to form partnerships, and in those which relate to the appointment of receivers and managers. Indeed, notwithstanding the extent to which the rule has been relaxed in actions for an account, or for an injunction, one of the first points for consideration even now, when one partner sues another for equitable relief, is, can relief be had without dissolving the partnership? Undoubtedly it may, much more certainly than formerly, but not always when perhaps it ought. Without stopping to inquire how the question is to be answered in any particular case (for that

Modern rule.

<sup>1</sup>See, *post*, 947.

will be discussed hereafter), it may be stated as a general proposition, that courts will not, if they can avoid it, allow a partner to derive advantage from his own misconduct by compelling his co-partner to submit either to continued wrong, or to a dissolution (*j*); and that rather than permit an improper advantage to be taken of a rule designed to operate for the benefit of all parties, courts will interfere in modern times where formerly they would have \*declined to do so. At the same time courts will not take \*895 the management of a going concern into their own hands, and, if they cannot usefully interfere in any other manner, they will not interfere at all unless for the purpose of winding up the partnership.

## 2. *Of the rule not to interfere in matters of internal regulation.*

A court of justice will not interfere between partners merely because they do not agree. It is no part of the duty of the Court to settle all partnership squabbles: it expects from every partner a certain amount of forbearance and good feeling towards his co-partner; and it does not regard mere passing improprieties, arising from infirmities of temper, as sufficient to warrant a decree for dissolution,<sup>1</sup> or an order for an injunction, or a receiver. (*k*) And when partners have themselves agreed that the management of their affairs shall be entrusted to one or more of them exclusively, the Court will not remove the managers, or interfere with them, unless they are clearly acting illegally or in breach of the trust reposed in them. (*l*)

This principle has been extended to companies, and, as a general rule, it may be stated that a Court will not interfere between members of companies for the purpose of enforcing duties arising out of matters which are properly the subject of internal regulation. It will not interfere to control a majority, unless it sees that the majority has been or is doing, or is about to do, that which it is illegal even for a majority to do; and it follows

Disinclination  
to interfere  
in matters  
of internal  
regulation.

Internal man-  
agement of  
companies.

(*j*) See *Fairthorne v. Weston*, 3 Ha. 392.

<sup>1</sup> See *ante*, p. 227, and notes.

(*k*) See *Marshall v. Colman*, 2 J. & W. 266; *Smith v. Jeyes*, 4 Beav. 503; *Lawson v. Morgan*, 1 Price, 307; *Cofton*

*v. Hornor*, 5 Price, 537; *Warder v. Stilwell*, 3 Jur. N. S. 9; *Anderson v. Anderson*, 25 Beav. 190.

(*l*) See *Lawson v. Morgan*, 1 Price, 307; *Waters v. Taylor*, 15 Ves. 10.

from this, that the Court will not interfere in matters properly the subject of internal management until all reasonable attempts have been made to take the sense of the general body of partners on the matters in question; nor even then unless it is called upon to interfere to give effect to the will of the majority against a factious minority.

The leading decisions on this subject are *Carlen v. Drury*, *Foss v. Harbottle*, and *Mozley v. Alston*, which will serve to  
\*896 \*illustrate the application of the principle in question, as well to unincorporated as to incorporated companies.

In *Carlen v. Drury* (*m*), a large number of persons were partners in a concern called The Bankside Brewery, and six of them on behalf of themselves and co-partners, filed a bill against the managers and others, alleging circumstances of gross mismanagement and neglect on the part of the managers, and praying for an account, a dissolution, and a receiver. It appeared that by the company's deed of settlement, the managers might be removed at any general meeting; that general meetings were to be held at Lady-day and Michaelmas, or within a month after, at such place as the managers should appoint; that a committee of twelve persons should be annually elected for auditing accounts, and advising the managers; that if the managers should misbehave themselves, this committee, or any seven of them, should have the power of calling a special general meeting of shareholders to report thereon; and that no dissolution should be made without the consent of a majority of three-fourths of the shareholders at a general meeting. A motion for an injunction and a receiver was refused with costs, the Court not being satisfied that the means of redress provided by the parties themselves in the articles were not effectual, and being of opinion that the plaintiffs had a remedy in their own hands to which they had not resorted. From the judgment of Lord Eldon, it appears that the Court would, if necessary, have compelled the managers to call meetings; that in a case of delinquency clearly made out, the Court would have acted without hesitation; but that there must have been a positive necessity for the interference of the Court arising from the refusal or neglect of the committee to act; and that the Court would not in-

(*m*) 1 V. & B. 154. See, also, *Waters Taylor*, 15 Ves. 10; *Ellison v. Bignold*, 2 Jac. & W. 503; *Beaumont v. Mere-*

*dith*, 3 V. & B. 180; *Miles v. Thomas*, 9 Sim. 606.

terfere before the parties had tried that jurisdiction which the articles had themselves provided.

In *Foss v. Harbottle* (*n*), two members of an incorporated \*company, called The Victoria 897\* Park Company, filed a bill against the directors and others, charging them with a variety of fraudulent and illegal acts, whereby the property of the company was misapplied, aliened and wasted, and praying that the defendants might make good to the company the losses sustained by the acts complained of, and that a receiver might be appointed to apply the property of the company in discharge of its liabilities, and to secure the surplus. The general result of the act incorporating the company was (in the opinion of the Court) to make the directors the governing body, subject to the superior control of the proprietors, who, when assembled in general meeting, had power to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they might have originated. The Court was of opinion that the acts of the defendants complained of were of such a nature as to be capable of confirmation by a majority of the members of the company; that it did not appear that any attempt had been made to bring those acts before a general meeting of the shareholders; and that under those circumstances, the Court could not interfere at the suit of a minority, whatever it might have been induced to do if proper means had been resorted to and found ineffectual to set the general body of shareholders in motion.

Alleged fraud  
and miscon-  
duct.

*Foss v. Har-  
bottle.*

In *Mozley v. Alston* (*o*), a bill was filed by two shareholders of a railway company against the company and its directors, alleging that the latter had been illegally appointed; that they had possession of the seal of the corporation; and that they were about to use it for various improper purposes. The bill prayed that the directors who were defendants, might be restrained from acting as directors, and be ordered to place the seal, and the books and documents of the company, under the control of its lawful directors. It appeared from the statements of the bill that a majority of the shareholders agreed with the plaintiffs in

Directors im-  
properly ap-  
pointed.

*Mozley v. Al-  
ston.*

(*n*) 2 Ha. 461. Compare *Atwool v. Merryweather*, 5 Eq. 464 *n.*, which was also a case of fraud, but a majority of the shareholders excluding the defendants, supported the bill.

(*o*) 1 Ph. 790. Compare *Atwool v. Merryweather*, 5 Eq. 464, where the votes of the defendants turned the scale and the suit succeeded.

their view of the illegality of the defendants' appointment, and the court held that, if that were so, there was nothing to prevent  
 \*898 the company from filing a \*bill in its corporate character to remedy the alleged evils; and that as the plaintiffs showed no reason to justify them alone in applying to the Court for redress, they were not entitled to its assistance.

These cases have been followed by a variety of others. (*p*) One of the most characteristic of this class is perhaps *Bailey v. Birkenhead, &c., Railway Company*. *v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company* (*q*), where a bill was filed by one of a set of shareholders in an amalgamated company, alleging that an unfair and unnecessary call had been made upon that set, and seeking to restrain proceedings to enforce payment of the call. Lord Langdale thought that the case could only be considered as an attempt to induce the Court to interfere in the internal management of the affairs of a company, and to take upon itself to determine a question which might and ought to be determined by the shareholders themselves at general meetings.

Again in the Scotch case of *Orr v. Glasgow, &c., Railway Company* (*r*), a suit was instituted against a railway company and its directors, seeking redress on the ground that the directors were also directors of a rival company, and were acting in the interests of that company to the prejudice of the shareholders in the first company. The specific relief sought was, that certain calls might be set aside, and that monies already paid for calls previously made might be returned; but the suit was dismissed, on the ground that although the acts of the directors were beyond their powers, it was competent to the shareholders to ratify and adopt those acts, and the suit was not instituted for the protection of a majority of shareholders.

The latest case on this subject is *McDougall v. Gardiner* (*s*), where the Court was asked to restrain directors

(*p*) See, in addition to those mentioned in the text, *Edwards v. The Shrewsbury and Birmingham Rail. Co.*, 2 DeG. & Sm. 537; *Yetts v. The Norfolk Rail. Co.* 3 ib. 293; *Kent v. Jackson*, 14 Beav. 367, and 2 DeG. M. & G. 49; *Inderwick v. Snell*, 2 Mac. & G. 216.

(*q*) 12 Beav. 433.

(*r*) 3 MacQu. 799. Compare *Hodg-*

*kinson v. National Live Stock Insurance Co.* 26 Beav. 473, and 4 DeG. & J. 422, where, however, relief was sought in respect of other matters than the call.

(*s*) 10 Ch. 606, and 1 Ch. D. 13. The decision of V.-C. Malins, in 20 Eq. 388, was reversed, and the previous decisions of the same judge in *Featherstone v. Cooke*, 16 Eq. 298, and *Trade Auxiliary*

from carrying \*out certain arrangements without submitting \*899 them to the shareholders and to compel the directors to call a meeting. The shareholders had themselves power to call a meeting and it did not appear that a majority of the shareholders could not control the directors without the assistance of the Court, which was therefore refused.

Other instances will be referred to hereafter when treating of injunctions.

In such cases as these, those who complain of the managing body, should, before appealing to the Court, endeavor to bring their grievances before their fellow shareholders, and ascertain what the views of the majority are. (t) If the majority disapprove the conduct complained of, they can sue in the name of the company, and so obtain redress (u); or if the defendants prevent that course by turning the scale of votes, a bill by one shareholder on behalf of himself and others may be supported. (v) If, however, the majority, acting *bona fide*, agree with and sanction the course adopted or proposed to be adopted by the managing body, *and if that course is not illegal if approved by the majority*, the Court clearly cannot interfere.<sup>1</sup> But if that course will be a fraud on the minority, or illegal, although sanctioned by the majority of shareholders, then, even if it is approved by all of them except one, the Court will interfere at the suit of that single dissentient shareholder, and protect him and his interests: and in such a case it is not essential that he should appeal to the other shareholders before applying to the Court. (x)

Co. v. Vickers, *ib.*, can hardly be relied upon.

(t) See the foregoing cases.

(u) See the observations in *Foss v. Harbottle*, and *Mozley v. Alston*, and *McDougall v. Gardiner*, 1 Ch. D. 13, above referred to. In *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 211, a minority filed a bill in the name of the company, and the Court ordered a motion to take the bill off the file to stand over until a general meeting of shareholders had been called, and their opinion taken upon the question whether the suit

should be proceeded with. The same course was adopted in *East Pant du Lead Mining Co.* 2 Hem. & M. 254, where the bill was ultimately taken off the file.

(v) See *Atwool v. Merryweather*, 5 Eq. 464, where a bill by one shareholder on behalf of himself and others, was ultimately successful; although a bill by the company had been taken off the file.

<sup>1</sup> As to the powers of a majority, see *ante*, 598, and notes.

(x) See *Gregory v. Patchett*, 33 Beav. 595; *Atwool v. Mereweather* ? 5 Eq. 464.

Majority not interfered with if they are not doing what is illegal.

Lord *v* Copper Miners' company.

\*900 \*As an illustration of the proposition that the majority cannot be interfered with if they are not doing what is illegal for them to do, reference may be made to the case of Lord *v*. The Governor and Company of Copper Miners in England (*y*), where a shareholder in an incorporated mining company filed a bill to restrain the governing body from vesting the property of the company in trustees for the benefit of its creditors. Lord Cottenham (reversing the decision of V.-C. Knight Bruce) allowed a demurrer to the bill, on the ground that it was competent for a majority of shareholders to sanction such a proceeding, and that it appeared that in fact they had sanctioned it.

Otherwise if it is doing what is illegal. The important principle that one out of any number of shareholders or partners is entitled to the protection of the court against the *illegal* acts of the others (*z*), although he stands alone, was emphatically declared and strictly carried out by Lord Eldon in *Natusch v. Irving* (*a*) and *Const v. Harris* (*b*), both of which have been referred to in a former part of this work at considerable length. (*c*) In those cases Lord Eldon was dealing with partnerships and unincorporated companies; but precisely the same principle applies to all companies, whether incorporated by act of Parliament, charter, letters patent or registration.

Thus, in *Adley v. The Whitstable Company* (*d*), Lord Eldon restored a member of a company incorporated by act of Parliament, to rights from which he had been unlawfully excluded under color of a by-law of the company.

Preston *v*. Grand Collier Dock Company.

In *Preston v. The Grand Collier Dock Company* (*e*) the \*Vice-Chancellor of England overruled a demurrer to a bill, the object of which was to set aside an arrangement on the ground of fraud, and to

The contrary receives some countenance from, but is not really warranted by *Edwards v. Shrewsbury, &c. Rail. Co.* 2 DeG. & S. 537.

(*y*) 2 Ph. 740. See, too, *Gregory v. Patchett*, 33 Beav. 595; *Kent v. Jackson*, 14 Beav. 367, and 2 DeG. M. & G. 49; *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 219; *Inderwick v. Snell*, 2 Mac. & G. 216, where directors complained that they had been wrong-

fully removed.

(*z*) *i. e.* illegal although sanctioned by a majority.

(*a*) Gow. on Partn. App. 398.

(*b*) T. R. 518, 519.

(*c*) *Ante*, p. 601, *et seq.* See, too, *Chapple v. Cadell*, Jac. 537.

(*d*) 17 Ves. 315, and 19 ib. 304, and 1 Mer. 107, where a decree for an account of profits was made.

(*e*) 11 Sim. 327.

compel certain shareholders to pay calls, although it had been in effect unanimously resolved at a special general meeting of the company that no calls should be made upon them. So in *Beman v. Rufford* (*f*), the court, at the suit of a <sup>Beman v. Rufford.</sup> small minority of shareholders in a railway company, restrained what in effect would have been a transfer of the business of the business of that company to another company, although the great majority of shareholders in the former were desirous that such transfer should be made. So the court has interfered to prevent an improper payment of dividends (*g*); and to prevent a payment of dividends in shares (*h*); and to protect the preference shareholders in a company against the directors and other shareholders, who intended to make an illegal apportionment of dividends. (*i*) Upon the same principle, the court has over and over again interfered, at the instance of a minority of shareholders, to prevent an application of the funds of companies, to purposes foreign to those, to attain which alone such companies were formed. (*k*)

If a company incorporated for a special purpose is exceeding its powers to the detriment of the public, an action by the Attorney-General will lie; as an illustration of this, <sup>Action by Attorney-General,</sup> reference may be made to *Attorney-General v. Great Northern Railway Company* (*l*), where a railway company was restrained from carrying on extensive dealings in coals.

Where a fraud on a company is complained of by a <sup>Frauds sanctioned by a majority.</sup> minority only of its shareholders, considerable difficulty arises; for a transaction which is a fraud on the company may be repudiated or adopted by it at its option. \*Hence, if \*902 a majority of the shareholders not implicated in the fraud, *bonâ fide*, elect to ratify the transaction which they might, if they chose, repudiate, it seems that the court will not interfere at the instance of the minority (*m*); but if the fraud is a fraud by

(*f*) 1 Sim. N. S. 550. See, too, *Winch v. Birkenhead, &c.*, Rail. Co. 5 DeG. & Sm. 562; *Salomons v. Laing*, 12 Beav. 377; *Clinch v. Financial Corporation*, 5 Eq. 450 and 4 Ch. 117.

(*g*) *Bloxam v. Metropolitan Rail. Co.* 3 Ch. 337.

(*h*) *Hoole v. Great Western Rail. Co.* 3 Ch. 262.

(*i*) *Henry v. Great Northern Rail. Co.* 4 K & J. 1, and 1 DeG. & J. 606. See,

too, *Carlisle v. The Southeastern Rail. Co.* 1 Mac. & G. 689, and on the rights of preference shareholders, *ante*, p. 797.

(*k*) See *infra*, under the head Injunction, where the cases will be found collected.

(*l*) 1 Dr. & Sm. 154.

(*m*) See *Foss v. Harbottle and Mozley v. Alston*, *ubi supra*, and *per Wood*, V. C., in *Clinch v. Financial Corp.* 5 Eq. 482.

the majority upon the minority the court will protect such minority. (*n*)

After the foregoing remarks, it scarcely requires to be mentioned that the court will interfere to control a factious minority which impedes the execution of the lawful resolutions of the majority. (*o*) Nor can *Mozley v. Alston* (*p*) be considered as inconsistent with this proposition; for, although in that case the court certainly did refuse to interfere, it was not called upon to do so in a suit properly framed; and it is tolerably clear from the judgment, that if the majority had chosen to institute a suit in the name of the corporation, the court would have acted very differently. (*q*)

### 3. *Of the rule not to interfere at the instance of persons who have been guilty of laches.*

Independently of the Statutes of Limitations, a plaintiff may be precluded by his own laches from obtaining equitable relief. Laches presupposes not only lapse of time, but also the existence of circumstances which render negligence imputable; and unless reasonable vigilance is shown in the prosecution of a claim to equitable relief, the court, acting on the maxim, *vigilantibus non dormientibus subveniunt leges*, will decline to interfere. (*r*)<sup>1</sup>

(*n*) See *Atwool v. Merryweather*, 5 Eq. 464, *n.*; and the cases of illegality referred to above.

(*o*) See the *Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 211, in which the court did so interfere. See, too, *Fraser v. Whalley*, 2 Hem. & M 10.

(*p*) 1 Ph. 790, and *ante*, p. 897.

(*q*) See, also, *McDougall v. Gardiner*, 1 Ch. D. 13. In *Miles v. Thomas*, 9 Sim. 606, V.-C. Shadwell declined to restrain the sailing of a ship, although it would seem that the majority of the shareholders of the company to which the ship belonged, were opposed to her sailing on the voyage on which she was about to be sent. The report of this case is, however, obscure, not only as to

the facts, but also as to the reasons for the judgment.

(*r*) Laches may preclude relief, although actual acquiescence on the part of the plaintiff may not be proved, see *Evans v. Smallcombe*, L. R. 3 H. L. 256.

<sup>1</sup> See *Stout v. Seabrook*, 30 N. J. Eq. 187, and *Hall v. Clagett*, 48 Md. 224; (laches a bar to a bill for an account.)

Delay in demanding a partnership accounting to constitute laches, must have occurred subsequent to the dissolution of the co-partnership, and for so long a period as to make the claim stale. *Harris v. Hillegass*, 5 Pacific Coast L. J. 240.

A decree requiring a co-partner to ac-

\* In the early case of *Sherman v. Sherman* (s), two persons had dealings as merchants; one of them died; his widow filed a bill for an account, but, although the Statute of Limitations did not apply, the bill was dismissed, on the ground that many years had elapsed since the dealings in question had taken place, and the deceased had allowed any claims he might have had to slumber. (t) Again, where an account has been rendered, and has been long acquiesced in, unless fraud be proved, a court will not re-open it, although the account may be shown to be erroneous, and although no final settlement was ever come to. (u)<sup>1</sup> The same principle is acted on in taking accounts; for charges long improperly made and acquiesced in, or long omitted to be made, and known so to be, are regarded, in the absence of fraud, as having been made or omitted by agreement, and the question of mistake will not be gone into. (x)

\*903  
to a suit for  
an account.  
*Sherman v.*  
*Sherman.*

Acquiescence  
in accounts.

In actions by shareholders against companies and their directors, the laches of the plaintiff frequently proves fatal to his case. Thus, in *Gray v. Chaplin* (y), the directors of a canal company made an agreement for letting tolls for ninety-nine years, which agreement was both *ultra vires* and detrimental to the interests of the public. After the agreement had been acted upon for forty-seven years without any complaint being made, a bill was filed by two share-

Laches in proceedings  
against companies.

Setting aside  
agreements.  
*Gray v. Chaplin*

count, should be denied in every case where it appears the party seeking the account has by his laches, rendered it impossible for the court to do full justice to both parties. *Stout v. Seabrook*, *supra*.

In *Foster v. Rison*, 17 Gratt. 321, it was held that if the cause of action in a suit by one partner against his co-partner, for the settlement of the partnership accounts, be one to which the statute of limitations applies, but the lapse of time since such action accrued be not such as to bring the case within the statute, laches and lapse of time cannot, in themselves, constitute a bar to the suit. *Foster v. Rison*, 17 Gratt. 321.

(s) 2 Vern. 276.

(t) See, too, *Stuart v. Mellish*, 2 Atk.

610.

(u) *Scott v. Milne*, 5 Beav. 215, and on appeal, 7 Jur. 709. See, too, *Williams v. Page*, 24 Beav. 654; *Stupart v. Arrowsmith*, 3 S. M. & G. 176 noticed *infra*, p. 904.

<sup>1</sup> See *Heartt v. Corning*, 3 Paige, 566.

A formal settlement will not, four years after it has been made between partners who, having equally attended to, will be presumed equally cognizant of, its affairs, be disturbed, on the evidence of several debtors who testify, in general terms, to errors in the charges against them on the partnership books. *Coleman v. Marble*, 9 La. Ann. 476.

(x) *Thornton v. Proctor*, 1 Anst. 94, and see pp. 779, 784.

(y) 2 Russ. 126.

holders on behalf of themselves and the other shareholders to set aside the agreement and for an account. A great majority of the shareholders disavowed the suit, but the Vice-Chancellor held that this was immaterial (*z*), and he made an order for a receiver. Upon appeal, however, from this order, Lord Eldon held, that the plaintiffs could not avail themselves of the interest which the public might have in the matters complained of; and that, whatever relief might be obtained by the Attorney-General on \*904 \*behalf of the public (*a*), the plaintiffs were precluded by their own laches and acquiescence from disturbing the possession of the lessee of the tolls, at all events before the hearing of the cause and in the absence of the Attorney-General to represent the public. The order for the receiver was accordingly discharged. What became of the suit afterwards does not appear, but Lord Eldon's judgment left the plaintiffs small hopes of obtaining a decree.

In *Graham v. The Birkenhead, &c., Railway Company* (*b*), a suit was instituted by a shareholder in a company to restrain the completion of a part only of the company's works. There had been several suits for the same purpose instituted by other shareholders, but for reasons to which it is not material to advert, those suits were never effectually prosecuted. It had been known for a considerable time that it was not intended by the directors to complete the company's works as originally contemplated, and that in fact there were not sufficient funds for that purpose. It was also well known that the directors had for some time been completing part of the works. It was held that those who disapproved of the application of the company's funds to that limited extent, ought to have taken proceedings to stop it at once; and that having regard to the laches of the plaintiff he was not entitled to relief.

In *Stupart v. Arrowsmith* (*c*), a suit was instituted by a shareholder in a company against its directors and others for the purpose of compelling them to restore funds of the company alleged to have been illegally applied in buying up shares (*d*), and for a general account. It appeared,

(*z*) See 2 Sim. & Stu. 267, and 2 Russ. 132, note.

(*a*) See *ante*, p. 901.

(*b*) 2 Mac. & G. 146, and 12 Beav. 460.

(*c*) 3 Sm. & G. 176. See, too, *Kent v.*

*Jackson*, 14 Beav. 367, and 2 DeG. M. & G. 49; *Gregory v. Patchett*, 33 Beav. 595; *Scott v. Izon*, 34 Beav. 434.

(*d*) See, as to this, *Evans v. Coventry*, 8 DeG. M. & G. 835, and other cases, *ante*, p. 592, *et seq.*

however, that the alleged illegal purchase of shares had not taken place, and that the directors had laid accounts before the shareholders showing the amount of the company's receipts and expenditure, and the balance to be divided; that these accounts had been adopted at a general meeting, and that payments had been made to some of the shareholders upon the footing of \*these \*905 accounts. The suit was not instituted until three years after the adoption of the accounts, at the meeting referred to, and it was held that, under these circumstances, and no fraud having been proved, the plaintiff was not entitled to the interference of the Court.

In *Burt v. British Nation Assurance Association* (e) a suit by a director complaining of various improper acts done before he became a director, was dismissed, on the *Burt v. British Nation.* ground that for two years he had had the means of knowing what had been done, and had sanctioned what he afterwards sought to impeach.

It has even been held that a person who acquires a share from a former shareholder is precluded from complaining of what his predecessor could not complain of himself. (f)

Again, a person who seeks to rescind an agreement for fraud must bring his action within a reasonable time after he has discovered the fraud. (g)

With respect to companies, by far the most important decisions upon the subject of laches and acquiescence are those in which the foregoing principles were held to be applicable to questions arising in winding up companies; for it is now settled that if a person has retired from a company pursuant to an invalid agreement, which all the shareholders must be considered as having known, and which they have long suffered to remain unimpeached, such person cannot afterwards be placed on the list of contributories. (h)

Application of foregoing principles in winding up companies.

Brotherhood's case.

Smallcombe's case.

(e) 4 DeG. & J. 158. See, also, *Peek v. Gurney*, 13 Eq. 79; *Hunter v. Stewart*, 4 DeG. F. & J. 168.

(f) *Ffooks v. South-Western Rail. Co.* 1 Sm. & G. 142; *Peek v. Gurney*, 13 Eq. 79.

(g) *Sharpley v. Louth and East Coast Rail. Co.* 2 Ch. D. 663. See *infra*.

(h) *Brotherhood's case*, 31 Beav. 365, affirmed on appeal, 4 DeG. F. & J. 566, and confirmed by *Evans v. Smallcombe*, L. R. 3 H. L. 249. See, as to these cases, *ante*, p. 740, *et seq.* See, also, *Hunt's case*, 32 Beav. 387; *Gregory v. Patchett*, 33 ib. 595.

The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it.<sup>1</sup> In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

Thus, in *Cowell v. Watts* (i) the plaintiff and the defendant had agreed to take land for the purpose of improving it, and letting it upon building leases. A long lease was accordingly obtained, and was taken in the name of the defendant. The plaintiff then applied to the defendant to enter into a written agreement upon the subject of their joint adventure, but this the defendant declined. The defendant also assumed to act as sole owner of the land obtained; he removed the plaintiff's cattle from it, and borrowed money on a mortgage of the land, and expended such money in building upon it. The plaintiff all this time did nothing, although he was aware of what was going on. After a lapse of eighteen months the plaintiff, by his solicitor, called upon the defendant to perform the original agreement; and the defendant declining, a suit for specific performance was instituted. The bill, however, was dismissed with costs, on the ground that the plaintiff had by his conduct induced the defendant to suppose that the plaintiff had abandoned the speculation, and that the defendant had the sole right to the land.

The doctrine now under discussion is especially applicable to mining and other partnerships of a highly speculative character. Mining operations are so extremely doubtful as to their ultimate success, that it is of the highest importance that those engaged in them should know on whom they can confidently rely for aid; if, therefore, a person engages in a mining adventure in partnership with others, and disputes arise between them, and he is denied a partner's rights, he should be careful to assert his claims whilst the dispute is fresh; for if he lies by until the mine has been rendered prosperous by his co-partners,

<sup>1</sup> See the general doctrine of laches as a bar to specific performance, consid-

ered in 1 Story's Eq. Jur. § 771.

(i) 2 H. & Tw. 224.

and he then comes forward insisting on his rights as a partner, and seeks equitable as distinguished from legal relief, he will be refused it; on the ground that he has applied for it too late. (*j*) On this principle, \*in *Senhouse v. Christian* (*k*), where several persons were lessees of a colliery, and the lease being about to expire, one of them obtained a renewal of it in his own name, Lord Rosslyn dismissed with costs a bill filed by the others claiming the benefit of the renewed lease. The plaintiffs had allowed the defendant to work the colliery single-handed at a great expense; and although they were aware of all the facts when the original lease expired, they did not take any proceedings to enforce their rights until four years afterwards. This case was referred to with approbation by Lord Eldon, in the case of *Norway v. Rowe* (*l*), in which he refused a motion for a receiver made on behalf of a person claiming to be a partner, but whose rights had been long denied.

*Senhouse v. Christian.*

*Norway v. Rowe.*

Again, in *Prendergast v. Turton* (*m*), where the capital subscribed for working a mine was spent, and the plaintiffs refused to contribute more, but the other partners did contribute more, and ultimately, after a lapse of some years, succeeded in making the mine profitable, and then the plaintiffs came forward claiming their shares in the concern, their bill was dismissed by the Vice-Chancellor Knight Bruce, and his decision was affirmed on appeal. The same doctrine was applied in *Clegg v. Edmonson* (*n*), the facts of which were similar to those of *Senhouse v. Christian*, already referred to. In two respects *Clegg v. Edmonson* goes further than the other cases; for first, the defendants had brought in no fresh capital, the mine having paid its own expenses; and secondly, although the plaintiffs had not asserted their claims by legal proceedings, they had constantly insisted on their right to participate in the profits obtained by the defendants under the renewed lease. Upon this point, however, it was observed by the Lord Justice Turner, that

*Prendergast v. Turton.*

*Clegg v. Edmonson.*

(*j*) See, in addition to the case cited below, *Alloway v. Braine*, 26 Beav. 575, and *Walker v. Jeffreys*, 1 Ha. 341.

(*k*) Cited 19 Ves. 157, and reported in a note to 19 Beav. 356.

(*l*) 19 Ves. 144. There were more grounds than one for this decision, but the case is always regarded as an au-

thority in support of the doctrine acted on by Lord Rosslyn in *Senhouse v. Christian*.

(*m*) 1 Y. & C. C. 98, and on appeal, 13 L. J. Ch. 238.

(*n*) 8 DeG. M. & G. 787. The suit in so far as it sought for an account up to the time of dissolution was sustained.

he could not agree to a doctrine so dangerous as that a mere assertion of a claim, unaccompanied by any act to give effect to it, \*can avail to keep alive a right which would otherwise be precluded. (*o*)

In the cases already referred to it will be observed that there was no positive evidence that the plaintiff had ever abandoned his rights (*p*); and in *Clegg v. Edmonson* there was evidence to show that no abandonment had ever been contemplated. It need, however, scarcely to be observed that positive evidence of abandonment, in addition to the negative evidence derived from mere lapse of time, during which nothing has been done by the plaintiff, greatly improves the position of his opponent.

There are several cases illustrating this. In *Jekyl v. Gilbert* (*q*), two artificers agreed to do work for their joint benefit; after the work was done, the person for whom it was done refused to pay; the defendant requested the plaintiff to join in legal proceedings to compel payment, but the plaintiff declined. Thereupon the defendant brought an action for payment of the work done by him, and obtained a verdict. The plaintiff then claimed half the amount recovered, but the Court held that he was not entitled to any share of it.

So if a part-owner of a ship disapproves of a proposed voyage, and arrests the ship until the other part-owners give him security for his share, he is not entitled to any portion of the profits arising from such voyage. (*r*)

Again, where two persons agreed to take land on lease for a building speculation, and one of them afterwards opposed the prosecution of the speculation and died without ever having done anything to further it, it was held that the equitable estate and the legal

(*o*) This general proposition must of course be taken with reference to the case before the Court. It cannot be laid down as universally true that protests are useless. They exclude inferences which, in their absence, might fairly be drawn from the conduct of the party protesting, and are conclusive to show that no abandonment of right was intended. See in *Hart v. Clarke*, *infra*, p. 911.

(*p*) In *Prendergast v. Turton*, perhaps there was, and it is on the ground that there was, that Lord Chelmsford distinguished that case from *Hart v. Clarke*, which will be noticed hereafter. See 6 H. L. C. 657-9. See, also, *Garden Gully*, etc. Co. v. *McLister*, 1 App. Ca. p. 57.

(*q*) *McNaghten's Select Cases* in Chancery, 29.

(*r*) *Davis v. Johnston*, 4 Sim. 539.

estate were in the same person, viz., the \*survivor, and that \*909 he was not a trustee as to any portion of the land for the executors of the deceased. (s)

*McLure v. Ripley* (t) may also be referred to as illustrating the same principle. There the plaintiff and the defendant entered into an agreement for the joint purchase of <sup>*McLure v. Ripley.*</sup> goods to be sent to China for sale, and for the investment of the proceeds in the purchase of tea on the joint account. The money necessary for the purchase of the goods was to be supplied by the plaintiff and by the defendant jointly. It was, however, agreed that the defendant should in the first instance give bills for the whole amount of the purchase-money, and that when the bills fell due the plaintiff should provide his share of their amount for the purpose of enabling the defendant to pay them. In pursuance of this agreement goods were bought and sent to China, and bills were given by the defendant. Before any of the bills became payable it appeared likely that the adventure would result in a loss, and this was known to both parties. Shortly before the time when the first of the bills became due, the defendant applied to the plaintiff for his share of the amount of the bill. The plaintiff was not prepared to supply it, and the defendant thereupon gave the plaintiff the option of withdrawing from the speculation altogether. This offer was accepted, and the plaintiff formally resigned all share in the adventure. Shortly afterwards a new agreement was come to for the purchase by the plaintiff of part of the return cargo, in which, by the preceding arrangement, the defendant alone had become interested. The cargo arrived, and it was then found that the original speculation resulted in considerable profit. The plaintiff sought to avoid his agreement to withdraw, and his subsequent agreement for purchase, on the ground that after he had been applied to for money, and before he agreed to withdraw, the defendant had received two letters from his correspondents in China, which he had concealed from the plaintiff. These two letters, however, contained nothing calculated to lead to the supposition that the adventure would be more profitable than was previously imagined, and it was clearly shown that the defendant had not been guilty of any misrepresentation. It was accordingly held that the plaintiff \*had \*910 no right to be relieved from his contract merely because those letters had not been communicated to him. In delivering judg-

(s) *Reilly v. Walsh*, 11 Ir. Eq. 22.

(t) 2 Mac. &amp; G. 275.

ment, the Lord Chancellor proceeded upon the grounds that although at first both parties were entitled to all the information relating to their joint adventure, the plaintiff, by not advancing his share of the funds when required, ceased any longer to have the rights of a partner, and that, after having agreed to embark in the speculation for better and for worse, the plaintiff had no right whatever to say to the defendant, "Give me all your information, and I will decide whether I will be a partner or not."

It is now necessary to advert to one or two cases apparently at variance with the foregoing, and in which persons claiming the rights of partners have succeeded in obtaining the assistance of a court of equity, although their demands have been stale, and although the success of the joint adventure has been due to the exertions of those against whom those demands were made.

The case of *Lake v. Craddock* (*u*) is sometimes referred to as one of the class now in question. But this case, in truth, only decided that if one of several partners chooses to claim the benefit of partnership dealings, after having for some time ceased to take any part in the affairs of the partnership, he must contribute his share of the outlays made by the other partners, with interest. It was not decided in *Lake v. Craddock* that a partner could, on the above terms, claim the benefit of what had been done by the others; and although the decree gave a partner who had long abandoned the concern the option of either claiming a share on proper terms, or of being excluded altogether, the other partners do not appear to have raised any objection to this option being given.

The cases which are most at variance with those referred to in the preceding pages, are the recent cases of *Hart v. Clarke* and *Clements v. Hall*.

911\* \*In *Hart v. Clarke* (*x*) the facts were shortly as follows,—a mining company was formed on the cost-book principle,

(*u*) 3 P. W. 158. The bill in effect was filed by the plaintiff against four persons, his co-partners for an account. One of the defendants had long ceased to take any part in the partnership affairs. An account was decreed, and liberty was given to this defendant to come in on terms, or to be excluded. He appealed, being discontented with

the terms imposed.

(*x*) *Clarke v. Hart*, 6 H. L. C. 633, affirming *Harte v. Clarke*, 6 DeG. M. & G. 232, and reversing S. C. 19 Beav. 349. See, also, *Garden Gully, etc. Co. v. McLister*, 1 App. Ca. 39, also a case of forfeiture. Shares in cost-book companies may now be forfeited, see 32 & 33 Vict. c. 19 § 16, etc,

and there was no express agreement authorizing the forfeiture of shares on the non-payment of calls. The Hart v. Clarke. plaintiff and the defendants were the lessees of the mine and the only shareholders therein. Money being required for carrying on the mine, and the plaintiff not furnishing his proportion of the sum required, was, on more than one occasion, informed that on continued non-payment his shares would be forfeited, and ultimately they were declared forfeited. The plaintiff, who had all along denied the power of his co-adventurers to forfeit his shares, and had suggested modes of obtaining money which they had not approved, gave them notice that, in the event of the mine proving successful, he should expect his share of the profits, and should, if necessary, take legal proceeding to enforce his claim. A year and a half then elapsed, and at the end of that time he asserted his claim, and the defendants refusing to recognize it, a bill was filed for an account. The Master of the Rolls held it to be clear that no number of partners could exclude another partner and forfeit his share, but that the plaintiff was not entitled to be considered as still a partner; (1), because the notice to forfeit his share might be regarded as a notice to dissolve the partnership; and (2), because for nearly two years, he had taken no step whatever to assert his rights but had allowed other people to work the mine, and had only come forward when he found it had proved a profitable speculation. On appeal it was also held that the supposed right to forfeit had no existence; but it was further held (1), that the notice of forfeiture could not operate as a dissolution, inasmuch as that was not the object with which the notice had been given; and (2), that under the peculiar circumstances of the case, the plaintiff could not be held to have shown any intention to abandon the undertaking, and that the nature of mining speculations was such as to render it inequitable to lay \*down as a general rule that no adventurer should be entitled \*912 to relief in equity when the adventure becomes productive, unless he has paid up his calls whilst it remained unproductive.

The ground of the decision in the above case, and that which distinguishes it from *Senhouse v. Christian* and other cases alluded to above, is this, viz., that the plaintiff in *Hart v. Clarke* had, as one of the lessees of the mine, a legal interest therein, which nothing had displaced. The Court, therefore, was in this position: it was compelled either to make a decree in favor of the plaintiff, or to declare him a trustee of his share in the mine for the

Ground of the decision in the last case.

defendants; and there not being sufficient grounds for justifying the latter alternative, the former was necessarily adopted. Upon no other ground can the case, it is submitted, be distinguished from *Clegg v. Edmondson* and the other cases alluded to above; for, although reliance was placed in the judgment in *Hart v. Clarke*, on the distinct notice given by the plaintiff that he did not acquiesce in the defendant's conduct, and should insist on his rights, it was decided in *Clegg v. Edmondson* that a protest did not enlarge the time within which redress must be sought in a court of equity. (y)

*Clements v. Hall* (z) is another case in which, notwithstanding the lapse of a considerable time, it was held that relief ought to be given to a person claiming an interest in a mine; but the facts in that case were very peculiar, and four judges were equally divided, Lord Cranworth and Lord Justice Turner holding that the plaintiff was entitled to relief, whilst Lord Justice Knight, Bruce and Lord Romilly were of a contrary opinion. The facts were in substance as follows: A. and B. were lessees of a mine which they worked as partners. The lease expired, but the lessees continued in possession as tenants from year to year, and worked the mine as before. In 1847 A. died, leaving C. his executor, and bequeathing an interest in the mine to D. B., after the death of A. worked the mine alone, claiming it as his own entirely, and refusing to give any account to C., who however, constantly pressed \*913 for one. In 1850 B. negotiated for and \*obtained from the landlord a new lease, but on more onerous terms than before. Of this C. had no notice. After the new lease, B., who since the death of A. had only kept the mine going, began to work it in earnest and at a profit; and in 1851 D. filed a bill against B. and C. to establish his interest in the mine. C. admitted D.'s title, but B. put in no answer, and the suit was not prosecuted. In 1853 B. died and C. became his representative. In 1854 the plaintiff, who was the assignee of D.'s interest, filed a bill in the nature of a supplemental bill to D.'s former bill, and sought to have D.'s interest in the mine secured for his, the plaintiff's benefit. C., who as the representative of A., had admitted D.'s right in his suit, now, as representative of B., opposed the plaintiff's claim, and insisted on lapse of time as a defense to the suit. But it was held (1), that on A.'s death, his interest in the mine did not determine; (2), that his estate was entitled to share the benefit of the renewed lease; (3), that A.'s representa-

(y) *Ante*, p. 907.

(z) 2 DeG. &amp; J. 173, and 24 Beav. 333.

tive was not precluded in 1853 from asserting this right against B., inasmuch as B. had kept A.'s representative in ignorance of the real state of the concern; and (4), that there had been no laches on the part of the plaintiff or of D., through whom he claimed, inasmuch as, since 1851, there had been a bill on the file to secure their interest.

Lastly, on the subject of laches it may be observed that, as positive evidence of abandonment materially strengthens the case of those resisting a stale demand, so, on the other hand, positive evidence of recognition affords an answer to a defense grounded on laches and lapse of time. Thus, where a shareholder in a company became bankrupt, but his shares were carried in the books of the company to a separate account, and he was regularly credited with the dividends which became payable in respect of those shares, his assignees were held entitled to the shares and accumulated dividends, although twenty years had elapsed since any claim had been made to them (*a*).

Effect of recognition of title.

Notwithstanding *Hart v. Clarke*, and *Clements v. Hall*, it is submitted that the doctrine laid down and acted upon in *\*Norway v. Rowe*, *Senhouse v. Christian*, *Prendergast v. Turton*, and *Clegg v. Edmondson* may still be safely relied on in all cases except those in which the court can be driven, as it was in *Hart v. Clarke*, to the alternative of holding either that the plaintiff is entitled to relief, or that he has abandoned and lost his former *legal* status (*b*).

\*914 Result of the cases.

Laches, as a defense to an action, cannot be taken advantage of by demurrer, if it can only be made out inferentially from the statements in the claim (*c*).

Demurrer on the ground of laches.

#### SECTION IV.—ACTIONS FOR SPECIFIC PERFORMANCE.

If two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, for specific per-

General rule against specific performance of agreements for partnership.

(*a*) *Penny v. Pickwick*, 16 Beav. 246. See, too, the recognition of title in *Clements v. Hall*, *ante*, p. 912.

(*b*) See, also, *Garden Gully, &c. Co. v. McLister*, 1 App. Ca. 39, which shows that in such a case as *Hart v. Clarke*,

something more than mere laches is necessary to deprive a plaintiff of relief.

(*c*) See *Deloraine v. Browne*, 3 Bro. C. C. 633; *Mitf. Pl.* 212; *Turner v. Borlase*, 11 Sim. 17.

formance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter any more than to compel a man to marry a woman he did not like would be for the benefit of the lady. Moreover, to decree specific performance of an agreement for a partnership at will would be nugatory, inasmuch as it might be dissolved the moment after the decree was made; and to decree specific performance of an agreement for a partnership for a term of years, would involve the court in the superintendence of the partnership throughout the whole continuance of the term. As a rule, therefore, courts will not decree specific performance of an agreement for a partnership (*d*)<sup>1</sup>. Nor will specific performance be decreed of an agreement to become a partner \*915 and bring in a \*certain amount of capital, or in default to lend a sum of money to the plaintiff (*e*).

However, if the parties have agreed to execute some formal instrument which would have the effect of conferring rights which do not exist so long as the agreement is not carried out, in such a case, and for the purpose of putting the parties into the position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved. (*f*)<sup>1</sup> The principle upon

(*d*) *Scott v. Rayment*, 7 Eq. 112; *Herey v. Birch*, 9 Ves. 357; *Sheffield Gas, etc., Co. v. Harrison*, 17 Beav. 294; *Downs v. Collins*, 6 Ha. 418. See, also, *Maxwell v. The Port Tennant Co.* 24 Beav. 495, and *Vivers v. Tuck*, 1 Moore, P. C. N. S. 516, where, however, there was fraud.

<sup>1</sup> See *Buck v. Smith*, 29 Mich. 166; *Meason v. Kaine*, 63 Pa. St. 335; *Whitworth v. Harris*, 40 Miss. 483.

An agreement to enter into a partnership, and as a member of a firm to use and exercise personal skill and judgment in the control and management for the firm of the partnership business, is not enforceable specifically. *Buck v. Smith*, *supra*.

Defendant agreed in writing to repair plaintiff's steam saw-mill, buildings, fences, etc., and plaintiff to sell to defendant as soon as the repairs were finished one undivided moiety of the

premises on which the mill was situated; plaintiff and defendant then to form a partnership to work the mill for one year, at the end of which time, if plaintiff chose to retire, defendant was to pay him for the premises a fixed sum; but if plaintiff did not choose to retire, the partnership was to continue five years: *Held*, not a contract enforceable specifically. *Reid v. Vidal*, 5 Rich. Eq. 289.

(*e*) *Sichel v. Mosenthal*, 30 Beav. 371.

(*f*) *Buxton v. Lister*, 3 Atk. 385, and see 1 Swanst. 513, note, and *Stocker v. Wedderburn*, 3 K. & J. 403.

<sup>1</sup> Thus, where H. and W. formed a co-partnership to erect college buildings and to conduct an institution of learning, H. stipulating to use his influence to secure donations to the institution, abandoning a similar enterprise to enter into this partnership, and giving up a pastoral charge at a pecuniary sacri-

which the Court proceeds in a case of this description, is the same as that which induces it to decree execution of a lease under seal, notwithstanding the term for which the lease was to continue has already expired. (*g*)

In *England v. Curling* (*h*), the plaintiff and two of the defendants agreed to become partners as ship agents, for seven, fourteen, or twenty-one years, and they signed with their initials an agreement to that effect. A deed was prepared to <sup>England v. Curling.</sup> carry out the agreement; the deed, however, was never executed, and it differed somewhat from the agreement. The parties carried on business as partners under the agreement for eleven years, and then they began to quarrel. The defendant Curling, who appears to have been in the wrong from the beginning, gave notice to dissolve in three months; he retired from the partnership, and entered into partnership with other persons, and carried on business with them on the premises and in the name of the old firm. The new firm opened the letters addressed to the old one, and gave notice of its dissolution to its correspondents. The plaintiff then filed a bill for specific performance and an injunction, and he obtained a decree. (*i*)

\*The only other class of cases in which anything like specific performance of an agreement for a partnership will be \*916

fice, and W. agreeing to convey to H. certain parcels of land upon which the college buildings were to be erected, specific performance of the contract to convey was directed. *Whitworth v. Harris*, 40 Miss. 483.

In *Birchett v. Bolling*, 5 Munf. 442, an agreement to build a tavern in partnership was decreed to be specifically performed at the instance of a partner who furnished the ground for the purpose, and had fully performed the contract on his part, notwithstanding many of the partners were unwilling to carry it into effect, because in their opinion a change of circumstances had rendered the scheme unprofitable.

(*g*) See *Wilkinson v. Torkington*, 2 Y. & C. Ex. 726; and the cases there cited.

(*h*) 8 Beav. 129. See the observations of Lord Romilly on this case, in

30 Beav. 376.

(*i*) The following was the minute of the decree:—"The Court doth declare that the agreement for a co-partnership, dated, etc., is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly. Refer it to the Master to inquire whether any and what variations have been made in the said agreement by and with the assent of the several parties thereto since the date thereof. Let the Master settle and approve of a proper deed of co-partnership between the said parties in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement as hereinbefore directed, and let the parties execute it. Continue the injunction against the defendant Curling."

decreed, is where a person who has agreed with another to share the profits of some joint adventure, seeks to obtain that share after the adventure has come to an end.

Specific performance where an account only is wanted.

Although the decree giving him the relief he asks may be prefaced by a declaration that the agreement relied upon ought to be specifically performed, this has not the effect of creating a partnership to be carried on by the litigants, but merely serves as a foundation for the decree for an account, which is the substantial part of what is sought and given. An instance of this class of

*Dale v. Hamilton.*

cases is afforded by *Dale v. Hamilton*. (*k*) There, in substance, three persons had agreed to purchase land; to build on it and improve it; and then to sell it for their common benefit. Land was accordingly obtained, built upon and improved, and subsequently the right of one of the three persons to any share in the adventure was denied by the other two. He thereupon filed a bill for a sale of the land, for an account of the joint speculation, and for a proper distribution of the monies arising from the sale; and the Court held him entitled to this relief.

Another instance of the same kind is afforded by *Webster v. Bray*. (*l*) In that case the plaintiff and the defendant had been jointly retained as solicitors to a company.

*Webster v. Bray.*

They were not in partnership as solicitors generally, but the plaintiff insisted that they were partners as regarded the business done for the company, and that the payments made by the company to each ought to be shared by both. The defendant insisted that there was no partnership, and that each was to be paid for the work done by himself, and to retain for his own benefit all payments in respect of such work. The plaintiff having resigned, filed a bill

for an account, and the Court made a decree in his favor, declaring that the plaintiff and the defendant were jointly and equally interested in the profits and loss of the business transacted by them, or either of them, as solicitors to the company. (*m*)

Relief in the shape of specific performance may be required for other purposes besides carrying into execution agreements to form partnerships. The assistance of a Court is often requisite to compel those engaged in a going

Other cases of specific performance between partners.

(*k*) 5 Ha. 369, and 2 Ph. 266.

(*l*) 7 Ha. 159.

(*m*) *Robinson v. Anderson*, 20 Beav.

93, and 7 DeG. M. & G. 239, is a similar case.

concern, to act conformably to the articles of partnership;<sup>1</sup> and also to compel those who have dissolved partnership, to observe the stipulations into which they have entered. The principles on which the Courts act in granting or withholding assistance when sought for the former purpose, will be considered hereafter; and with respect to the specific performance, after a dissolution of partnership, of agreements entered into by the partners previously to, or at the time of dissolution, it need only be observed that relief will be granted or refused upon the principles by which the Court is ordinarily guided in questions of specific performance, and that nothing turns on the circumstance of the litigants having been partners. It would, therefore, be foreign to the objects of the present treatise to prosecute this subject further; but for the purposes of reference, it may be useful to mention that the Court has enforced the following agreements entered into upon or with a view to a dissolution; namely—

Agreements not to carry on business within a certain distance or for a certain space of time (*n*);

Agreements as to the custody of partnership books and the furnishing of copies thereof (*o*);

<sup>1</sup> A court of equity has power, at the suit of one partner, to compel another to contribute a sum stipulated as capital, or to restore it to the common fund, if he have withdrawn it before the debts are paid; and when a special partner, under a limited partnership, does not pay in the amount of his capital specified in the certificate, and the firm, having become insolvent, assigns their property for the benefit of creditors, the trustee may compel the delinquent partner to pay in the deficiency of his capital. *Robinson v. Davidson*, 3 E. D. Smith, 221.

The owner of a zinc mine agreed with certain other persons to furnish 2000 tons of ore each year for three years, on being paid \$10 per ton therefor, the other persons agreeing to furnish suitable buildings for its conversion into paints, and to divide the profits with the mine owner after a certain time. Under this agreement the

mine owner furnished 746 tons of ore, received for it \$5,860, leaving \$1,600 still due when the other parties refused to receive any more or to appropriate the buildings to the manufacture, alleging that the business could only prove ruinous to all concerned. The time specified for furnishing the ore had expired; the business was proved to be hazardous, and the buildings and machinery unfit for the manufacture: *Held*, specific performance would not be enforced, because an adequate remedy at law existed for the breach. *Manning v. Wadsworth*, 4 Md. 60.

(*n*) *Whittaker v. Howe*, 3 Beav. 383; *Turner v. Major*, 3 Giff. 442; and see *Coates v. Coates*, 6 Madd. 287, and *Williams v. Williams*, 1 Wils. Ch. 473, note.

(*o*) *Lingen v. Simpson*, 1 Sim. & Stu. 600, and see *Whittaker v. Howe*, 3 Beav. 383.

Agreements that a third party, and he only, shall get in debts (*p*);

Agreements that the value of the share of an outgoing or a deceased partner, shall be ascertained in a specified way and taken accordingly (*q*);

\*918 Agreements that an outgoing partner shall offer his share to his co-partners, before selling it to other persons (*r*);

Agreements to grant an annuity to a retiring partner and his widow (*s*);

Agreements not to divulge or make use of a trade secret. (*t*)

An agreement to form a company is one of the specific performance of which can hardly ever be decreed. Such an agreement may be perfectly valid and binding, but, this is not sufficient to entitle one of the parties to it

Specific performance of agreements to form company.

to a decree for specific performance by the other; for this purpose the agreement must not only be valid, but must also be one which a Court can compel performance of in all essential points; if this is practically impossible, an action for damages, and not for specific performance, is the proper remedy. In *Stocker v. Wedderburn* (*u*), the plaintiff had obtained a patent, and it was agreed between him and the defendants that a company should be formed by them for the purpose of working the patent; that the plaintiff should assign the patent to the company, give his whole services to it for two years, do his best to improve his invention, and give the company the full benefit of all improvements. Owing to a doubt respecting the validity of the patent, the defendant refused to abide by the agreement, and thereupon the plaintiff filed a bill for specific performance, praying, amongst other things,

(*p*) *Davis v. Amer*, 3 Drew. 64; *Turner v. Major*, 3 Giff. 442.

(*q*) *Morris v. Kearsley*, 2 Y. & C. Ex. 139; *Essex v. Essex*, 20 Beav. 442; *King v. Chuck*, 17 Beav. 325; and see *Featherstonhaugh v. Turner*, 25 Beav. 382, and *Gibson v. Goldsmid*, 5 DeG. M. & G. 757, reversing S. C. 18 Beav. 584. Compare *Downs v. Collins*, 6 Ha. 418, where to have enforced the agreement would have been to decree specific performance of a contract for a partnership; and *Cooper v. Hood*, 7 W. R. 83, where a decree was refused on the ground that

the agreement sought to be enforced was too vague in its terms. See, as to agreements for a valuation, *ante*, p. 850.

(*r*) *Homfray v. Fothergill*, 1 Eq. 567.

(*s*) *Aubin v. Holt*, 2 K. & J. 66; *Page v. Cox*, 10 Ha. 163; and *Bonville v. Bonville*, 6 Jur. N. S. 414, M. R., where the agreement sued upon was decided not to bear the construction contended for by the plaintiff.

(*t*) *Morison v. Moat*, 9 Ha. 241.

(*u*) 3 K. & J. 393. See, too, *Maxwell v. Port Tennant Co.* 24 Beav. 495, where, however, there was fraud.

that the defendants might be decreed to take such steps as might be necessary for the registration and incorporation of the company. To this \*bill the defendants demurred, and the demurrer \*919 was allowed with costs, on the ground that the agreement was one and entire, and that if a decree were made in the plaintiff's favor, the Court could neither compel him to perform his part nor restore the defendants to their original position in case he did not.

Where two companies, having power to amalgamate, have entered into a binding agreement so to do, specific performance of the agreement will be decreed, if its terms are such that a decree for specific performance can practically be enforced. In the *Anglo-Australian Assurance Company v. British Provident Insurance Society* (*x*), an agreement by the defendant company to take the assets and liabilities of the plaintiff company, and to indemnify it against its liabilities, was specifically enforced.

Specific performance of agreement to amalgamate.

The question whether a court will decree the specific performance of an agreement to allot and accept shares in a company, has given rise to some difference of opinion. An ordinary contract for the sale of shares is one which the Court will decree to be specifically performed (*y*); and it is immaterial whether the vendor has or has not other shares which he does not sell, or, in other words, whether he and the purchaser will or will not become co-shareholders. But a contract for the sale of shares by one individual to another, is distinguishable in many respects from a contract for the allotment and acceptance of shares in a company to be formed, and authority is not wanting to show that specific performance of a contract of this last description will not be decreed. (*z*) There is, however, at least, equal authority the other way (*a*), and on principle, it is \*conceived \*920 that, assuming the existence of a valid agreement to take

Specific performance of agreements to take shares.

(*x*) 4 Giff. 521, and on appeal, 4 D. G. F. & J. 341.

(*y*) *Ante*, p. 720.

(*z*) *Sheffield Gas, &c. Co. v. Harrison*, 17 Beav. 294; *Bluck v. Mallalue*, 27 Beav. 398; *Columbine v. Chichester*, 2 Ph. 27. In this last case there were circumstances to show that specific performance was impossible.

(*a*) See *New Brunswick and Canada Rail. Co. v. Muggeridge*, 4 Drew. 686, and 1 Dr. & Sm. 363; *Oriental Steam*

*Nav. Co. v. Briggs*, 4 DeG. F. & J. 191. Although in both of these cases a decree was refused, in the first on the ground of fraud, and in the second on the ground that there was no concluded agreement, yet the judgments delivered in them show that there is no rule against decreeing specific performance of such agreements as are alluded to above. See, also, *Ferguson v. Wilson*, 2 Ch. 77.

shares, there is no adequate reason why such an agreement should not be decreed to be specifically performed. It is true that the applicant for shares might sell and transfer his shares as soon as the decree was made, but the decree would nevertheless not be inoperative. If the applicant were the plaintiff, he could not be got rid of; whilst if he were the defendant, he could only retire from the company by transferring his shares to somebody else. The reason therefore which induces the Court to decline to decree specific performance of an agreement for an ordinary partnership at will, is scarcely applicable to such an agreement as that now under consideration. Moreover, nothing is more common than for the promoters of a company to agree to sell property to the company in consideration of a certain number of paid-up shares, and it is certainly difficult to see why such a contract should not be enforced; indeed, there is good authority for saying that a decree for its specific performance may be obtained. (b) Again, persons who have agreed to take shares in a company are every day made contributories for the purpose of winding up; and they are so upon the ground that, although they are not actually shareholders, they have entered into an agreement to take shares which is binding upon them. Many of these cases are only intelligible upon the assumption that a contract for the allotment and acceptance of shares is one which a court ought to enforce.

In order, however, that specific performance of an agreement to take or deliver shares in a company may be decreed, it is necessary that the agreement should be concluded and binding (c), and be untainted by fraud (d) or unfairness (e), and be capable of being performed by the defendant (f), and not involve any breach of trust (g), or performance by either party of obligations, the performance of which a court cannot practically enforce. (h)

Defenses to suits for specific performance of agreement to take shares.

(b) See *Fyfe v. Swabey*, 16 Jur. 49, M. R.

(c) Which it was not in *Oriental Steam Nav. Co. v. Briggs*, 4 DeG. F. & J. 191.

(d) Which was not the case in *New Brunswick and Canada Rail. Co. v. Muggeridge*, 4 Drew. 686 and 1 Drew. & Sm. 363; or in *Maxwell v. Port Tennant Co.* 24 Beav. 495.

(e) As to agreements between co-directors, see *Flanagan v. Great West-*

*ern Rail. Co.* 7 Eq. 116.

(f) *Ferguson v. Wilson*, 2 Ch. 77; *Columbine v. Chichester*, 2 Ph. 27. As to the impossibility of obtaining registration of transfers, *ante*, pp. 720, 727.

(g) *Fry on Spec. Perf.* p. 113, and see *Flanagan v. Great Western Rail. Co.* 7 Eq. 116.

(h) *Flanagan v. Great Western Rail. Co.* 7 Eq. 116; *Stocker v. Wedderburn*, 3 K. & J. 393, *ante*, p. 918.

As regards impossibility of performance, it is to be observed that an agreement by A. that B. shall do something, can only be decreed to be specifically performed if the agreement, although in form by A., is in truth an agreement by B. himself, or if B. is bound to do that which it has been agreed he shall do. If B. is not bound by the agreement or otherwise, to do what A. has agreed he, B., shall do, no decree for specific performance can be made against either A. or B. These observations apply to agree- Agreement with promoters and directors. ments made by promoters and others, to be performed by a company; if the company is not bound by the agreement, a decree cannot be made either against the company or against the individuals who entered into the agreement. (*i*) So if directors agree to allot shares, and the agreement is in point of law the agreement of the company, the directors individually can neither be compelled to perform it nor to compensate the plaintiff for its non-performance. (*k*)

As a general rule, a person who is not a party to an agreement is not entitled to sue for its specific performance; and Mixed cases of agreement and fraud. where a person has been induced to take shares on the faith of an agreement by others that they will do the same, but which agreement was not made with him, his right against them must be based on their misrepresentation made to him, and not on their agreement between themselves, with which he had nothing to do. An instructive case on this head is *Bell v. Lord Mexborough*. (*l*) There an unsuccessful attempt was Bell v. Mexborough. made by the subscribers to an abortive railway company to compel two members of the provisional committee to perform an agreement to take shares, alleged to have been entered into between them and the managing committee, and to pay up the deposits on the shares so agreed to be taken. The bill alleged that the two members in question had, by appearing as provisional \*committee men, induced the plaintiff to take shares; that \*922 the same two members had accepted shares in the company from the managing committee, but had never paid the deposits upon them, and that the managing committee refused to take proceedings to compel payment of such deposits. The bill also complained of several acts of misconduct on the part of the managing committee, and stated that unless all the deposits on the shares

(*i*) *Ellis v. Colman*, 25 Beav. 662.

(*k*) *Ferguson v. Wilson*, 2 Ch. 77.

(*l*) 10 Jur. 893, and 12 Jur. 64 on appeal; also, in 5 Ra. Ca. 149.

taken were paid up, the company would be insolvent, and the plaintiffs would be liable to be sued by its creditors. The bill then prayed for an account of the dealings and transactions of the company and an account of its assets, including the amounts due from the two members in respect of the shares they had agreed to take, and for the application of the assets in discharge of the liabilities of the company. A demurrer to this bill by the two members complained of, was allowed, on the ground that the plaintiffs had not made out any case for relief against them, and that the plaintiff's remedy was against the committee of management only. The plaintiffs were, in fact, endeavoring to enforce a contract not made with themselves, and they did not seek on the ground of misrepresentation, any relief to which they would not have been entitled had no such misrepresentation been made. It moreover appeared, from the plaintiff's own showing, that the demurring defendants had never signed the subscribers' agreement or Parliamentary contract, or done more than express their willingness to take such shares as might be allotted to them.

Although a court will decree specific performance of an agreement to sell shares, it will not interfere to compel the completion of a gratuitous and intended, but unperfected transaction. Thus, if a person voluntarily settles shares on others, but does not transfer them, or actually constitute himself a trustee of them, the persons intended to be benefited by the settlement do not acquire any equitable title to the shares enforceable against the settler or his representatives. (*m*)

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923\* \*SECTION V —ACTIONS FOR MISREPRESENTATION AND FRAUD.

1. *General Observations.*

The proper remedy for a person who has been induced by fraud to become a partner with another, or to take shares in a company depends, in the first place on who the person is who committed the fraud. Speaking generally and subject to certain qualifications which will be noticed hereafter, if the fraud complained of has been committed by the other partner or the company, the person de-

(*m*) *Millroy v. Lord*, 8 Jur. N. S. 806, L. J.

frauded has the option of affirming or of rescinding the contract into which he has been induced to enter; and whether he affirms it or disaffirms it he is entitled to damages for any loss which he may have sustained by reason of the fraud. (*n*) But if the fraud has been committed by some third person and is not in point of law imputable to the other partner or the company, then the person defrauded has no such option: he cannot rescind the contract: he can only sue those who defrauded him for damages.<sup>1</sup> But it will be observed from this general statement that in cases of this class there is always a preliminary question to be considered, and which, if negatived, leaves the complainant without any redress at all: that question is, Has he in fact been induced by fraud to enter into the contract of which he complains? On this preliminary question a few observations may be useful.

No attempt is ever made to give any precise definition of fraud, or to restrict by words the circumstances which may be regarded as amounting to it in point of law. New cases <sup>1. Untruth necessary.</sup> of fraud must always be met by new decisions. (*o*) But by the law of this country a sharp line is drawn between a breach of a promise or the disappointment of hopes raised by the expression of intentions or expectations, on the one hand, and an untrue statement on the other (*p*); and speaking generally there is no fraud sufficient to support an action for damages \*or to set aside a \*924

(*n*) *Small v. Attwood*, You. 507; *Pulsford v. Richards*, 17 Beav. 87; *Cruikshank v. McVicar*, 8 Beav. 106. And see *Beck v. Kantorowicz*, 3 K. & J. 230, and cases of that class.

<sup>1</sup> When one of a number of persons who, each with the others, agrees to contribute money and form a partnership for a specified purpose, represents to another the existence of facts on which the latter relies, but which do not exist, the other parties are not bound by such representations, and the contract is not thereby invalidated, as between the party deceived and the others. *Kimmins v. Wilson*, 8 W. Va. 584. See, also, *Geddes's Appeal*, 80 Pa. St. 442.

If, in the course of negotiations between two partners, pending an offer

by one to sell out his interest to the other, a third partner, having better opportunities than either of them to form a correct opinion of the value of the interest in questions, voluntarily expresses a pretended opinion misrepresenting his real belief, both of the others believing him sincere when he is not, neither of these will be responsible for his want of candor, and however much his pretended opinions (acquiesced in by both) may influence either in the final transaction, the sale will not, on that account be set aside. *Dortie v. Duzas*, 55 Ga. 484.

(*o*) 2 Sch. & Lef. 266.

(*p*) See *Jordan v. Money*, 5 H. L. C. 185; *Harris v. Nickerson*, L. R. 8 Q. B. 286.

contract in the absence of some untrue statement or of some concealment which makes what is stated substantially untrue. (*q*)

2. Untruth must be material and have been relied upon. In the next place the untrue statement must relate to some material matter, and have been made to the complainant directly, or indirectly as one of the public (*r*), and have been in fact relied upon by him. (*s*)

Whether the untrue statement must have been untrue to the knowledge of the person making it is a point still scarcely settled. If, indeed, he had no honest belief in its truth his ignorance of its untruth is immaterial. But if he honestly believed it to be true, courts of law and courts of equity have apparently taken different views; for whilst courts of law have held that an action for damages will not lie in such cases, courts of equity have held the person making the statement answerable for the consequences of its untruth, provided he made it in order that it might be acted upon, and it has been acted upon as he intended it should be. (*t*)

Assuming that on the principles above explained, a person has a right to rescind a contract on the ground of fraud, he may lose that right in one of two ways, viz., 1, by his own laches; and 2, by disabling himself from restoring what he may himself have received.

A person entitled to rescind a contract for fraud loses his right if he does not repudiate the contract within a reasonable time after the discovery of the fraud (*u*); and *a fortiori*, if after \*925 \*such discovery he does anything to affirm the contract, or anything which is inconsistent with his right to rescind it;

(*q*) See as to concealment, *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; *Peek v. Gurney*, L. R. 6 H. L. 377, and 13 Eq. 79; *Central Rail. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Oakes v. Turquand*, ib. 325; *New Brunswick, &c., Rail. Co. v. Muggeridge*, 1 Dr. & Sm. 381. See, also, *Gover's case*, 1 Ch. D. 182.

(*r*) That this is sufficient see *Clarke v. Dickson*, 6 C. B. N. S. 453.

(*s*) Illustrations of this will be given hereafter. See *Pulsford v. Richards*, 17 Beav. 87, and others of that class. In the remarkable case of the *Panama and South Pacific Telegraph Co. v. India*

*Rubber Co.* 10 Ch. 515, it was held that a contract might be rescinded for fraud subsequent to its date, but rendering its performance impossible.

(*t*) See *Slim v. Croucher*, 1 DeG. F. & J. 518.

(*u*) See, on this subject generally, *Clough v. L. & N. W. Rail. Co.* L. R. 7 Ex. 35, and as instances of repudiation being too late, see *Denton v. Macneil*, 2 Eq. 352; *Ashley's case*, 9 Eq. 263; *Scholey v. Central Rail. Co. of Venezuela*, ib. 266 note. Compare *Macniell's case*, 10 Eq. 503. *Campbell v. Flemings*, 1 A. & E. 40.

*e.g.*, if, in the case of shares fraudulently sold to him, he attempts to resell them (*x*), or continues to act as a shareholder. (*y*)

Further, a person induced by fraud to enter into a contract cannot rescind it unless he is himself able to rescind it *in toto*, and to restore the other party to his former <sup>Rescission *in toto*.</sup> position, or unless his inability so to do is attributable to that party. (*z*) But if the the contract is severable, inability to rescind it as to part is not fatal to the right to rescind it as to another part. (*a*)

In the simple case where two parties only are concerned, viz., the partner defrauded and the partner defrauding, the right of the former to rescind the contract of partnership, cannot for a moment be doubted.<sup>1</sup> But where third <sup>Cases of fraud where an innocent party intervenes.</sup> persons are concerned to whom no fraud is legally or morally imputable, considerable difficulty is experienced in giving effect to this right of the party defrauded, and to the conflicting rights of those who have acted on the faith of his being a partner, and who insist, therefore, that as between him and them he cannot be heard to say that he is not one. (*b*)<sup>2</sup> This difficulty is particularly felt when a creditor of a company seeks to levy execution against a person who is a shareholder therein, but who has been induced to become so by fraud; and when the question arises whether such shareholder ought to be put on the list of contributories on the winding up of the company. As regards the creditors, however, it is clear that their rights in no way depend upon whether a *de facto* shareholder has been induced to become a shareholder by fraud, or not (*c*); and those rights involve the necessity of putting

(*x*) Briggs' 1 Eq. 433.

(*y*) Sharpley v. Louth and East Coast Rail. Co. 2 Ch. D. 663.

(*z*) See Phosphate Sewage Co. v. Hartmont, 5 Ch. D. 394; Laing v. Campbell, 36 Beav. 3; Clarke v. Dickson, E. B. & E. 148; Maturin v. Tredinick, 2 N. R. 514, and 4 ib. 15, noticed more fully hereafter.

(*a*) See last note.

<sup>1</sup> See *post*, p. 927, and note.

(*b*) *Ex parte* Broome, 1 Rose 69; Jeffreys v. Smith, 3 Russ. 158; Macbride v. Lindsay, 9 Ha. 574.

<sup>2</sup> A deception practiced by one partner

on another, has no effect upon their obligations to third persons who are not privy to it. Seawell v. Payne, 5 La. Ann. 255.

The liability of a dormant partner, however, may, it is held, be avoided by proof of fraud in forming the partnership, if no part of the funds have been received by such dormant partner. Mason v. Connell, 1 Whart. 381.

(*c*) Henderson v. The Royal British Bank, 7 E. & B. 356; Daniel v. The Royal British Bank, 1 H. & N. 681; Powis v. Harding, 1 C. B. N. S. 533; Howard v. Shaw, 9 Ir. Law Rep. 335.

such a shareholder on the list of contributories as will be seen hereafter when that subject is examined. (*d*)

\*926 \*Having made those preliminary observations as to the rights of persons who have been induced to enter into contracts by fraud to rescind contracts for fraud generally, it is proposed to allude shortly to actions for damages, and then to examine the cases which bear more particularly on the right to rescind—first, contracts between ordinary partners and their representatives; secondly, contracts to take shares in companies.

## 2. *Actions for damages.*

Where a person has been induced by the false and fraudulent representations of another to enter into partnership with him, an action will clearly lie at the suit of the first person against the second for the recovery of damages in respect of such fraud. (*e*) And if false representations are made by means of advertisements issued for the purpose of inducing persons to take shares in a company, any person who is ensnared by those advertisements, and take shares on the faith of them, may maintain an action against those persons who caused them to be published, knowing them to be false. (*f*)<sup>1</sup> In order to maintain an action for misrepresentation, it is not necessary that there should have been any direct communication between the defendant and the plaintiff. (*g*)

Actions against promoters and others based on the Companies act, 1867, § 38, have been already alluded to (*h*); as have also actions against promoters and others for the recovery of money obtained by them by frauds on companies. (*i*)

(*d*) See *infra*, book iv. ch. 3, under the head Contributories. See, as to fraud as a defense to an action for calls, *infra*.

(*e*) See the cases in the next two notes, and *Dobell v. Stevens*, 3 B. & C. 623.

(*f*) *Davidson v. Tullock*, 3 McQu. 783; *Cullen v. Thompson*, 4 ib. 424; *Bale v. Cleland*, 4 Fos. & Fin. 117; *Gerhard v. Bates*, 2 E. & B. 476; and see

*Denton v. The Great North. Rail. Co.* 5 E. & B. 860; *Watson v. Charlemont*, 12 Q. B. 856.

<sup>1</sup> See *Cooley on Torts*, 494, 495.

(*g*) See *Clarke v. Dickson*, 6 C. B. N. S. 453; and see *Bedford v. Bagshaw*, H. & N. 538.

(*h*) *Ante*, vol. i. pp. 115, 323.

(*i*) *Ante*, vol. i. p. 580 *et seq.*, and p. 587 *et seq.*

\*3. *Actions for rescission of contract.*

\*927

*(a) Contracts between ordinary partners and their representatives.*

Where a person is inveigled by the false representations of others to become a partner with them, the Court will rescind the contract of partnership at his instance; and will compel those who inveigled him into joining them to repay him whatever he may have paid them, with interest, and to indemnify him against all claims and demands to which he may have become subject by reason of his having entered into partnership with them, he on the other hand accounting to them for what he may have received since his entry into the concern. (*k*)<sup>1</sup>

(*k*) See *Pillans v. Harkness*, Colles Parl. Ca. 442; *Ex parte Broome*, 1 Rose, 71, and 1 Coll. 598, note; *Hamil v. Stokes*, Dan. 20, and 4 Price, 161; *Stainbank v. Fernley*, 9 Sim. 556; *Jauncey v. Knowles*, 8 W. R. 69. *Clifford v. Brooke*, 13 Ves. 131, was not a case of this class; the plaintiff there sought to recover money which he had paid, not for the admission of himself, but for the admission of his brother into partnership with the defendants. The plaintiff's remedy under these circumstances was held to be by an action at law. An action may be sustained by the rescission of a contract of partnership, on the ground of fraud, or in the alternative for its dissolution. *Bagot v. Easton*, 7 Ch. D. 1.

<sup>1</sup> Where one of the parties to an agreement of partnership has been induced to enter into it by the false and and fraudulent representations of the other, the partnership may be declared void, and the articles canceled. *Hynes v. Stewart*, 10 B. Mon. 429; *Howell v. Harvey*, 5 Ark. 270; *Smith v. Everett*, 126 Mass. 304.

When declared void upon that ground, the injured party, except as regards creditors of the firm, should not be regarded as a partner, or subjected to any of the

loss sustained by them, and is entitled to redress against the perpetrator of the fraud to the extent of his injury, unless he has continued the partnership after discovering the fraud. *Hynes v. Stewart*, *supra*.

A court of equity has jurisdiction in such case to restrain the fraudulent party from using the name of the other as a partner; and having obtained jurisdiction for that purpose, may administer complete relief in the same suit by ordering the former to pay the sums advanced or expended by the latter on account of the partnership. *Smith v. Everett*, 126 Mass. 304.

If a court of equity finds a contract of partnership to be void in its inception, on account of the fraud of one partner in inducing the other to enter into the partnership, it may award as damages that the fraudulent partner shall repay to the other all sums of money the latter has paid into the firm as his portion of the capital stock; pay him a reasonable compensation for the time he has acted as co-partner, and indemnify him for all liability arising out of the business in which they have been engaged. *Richards v. Todd*, 127 Mass. 167.

The defendant, under an oral agree-

The case of *Pillans v. Harkness* (7), affords a good example of this. In the spring of 1709, four persons, Pillans, Harkness, Stewart, and Denn, agreed by deed to become partners in the fishing trade, and to share the profits and losses equally, confining their fishing to the west coasts of North Britain. It was subsequently agreed to extend the fishing operations and to increase the capital, and another deed was executed which, it appears, stated that the capital originally agreed to be subscribed had been duly paid by all the partners. Harkness was to take no active part in the partnership business, but Pillans was to have the exclusive management of it in the north, at a salary, and Stewart and Denn were to have the exclusive management of it in London; all proper accounts were to be kept by Stewart and Denn; and Harkness was to have free access to the accounts of the concern. Harkness, from time to time, paid various sums towards carrying on the business of the firm, \*but it does not appear that anything was ever divided in the shape of real or pretended profits. In the summer of 1711, Harkness discovered that Pillans, Stewart, and Denn, instead of being engaged in the fishing business for the benefit of the firm, were engaged in private speculations of their own in the wine trade. He also discovered, that Pillans and Stewart had not contributed their shares

ment with the plaintiff, which was void under the statute of frauds, obtained possession, by purchase, of certain property belonging to the plaintiff, as part of the plaintiff's contribution to a business, which such agreement provided that the defendant should prosecute for their common benefit: *Held*, that when the defendant refused to carry out the agreement, but used the property so purchased for his own exclusive profit, equity might compel the restoration thereof to the plaintiff on such terms as should be just. *Redfield v. Widdleton*, 1 Robt. 79.

A court of equity, in a suit for a dissolution of a partnership, cannot take cognizance of a claim of one of the partners complainant against the partner defendant, for damages for alleged fraud of such defendant partner, consisting of alleged false representations

as to the utility of certain machinery to be used by the firm, and as to his ability to conduct it successfully and profitably. The remedy is at law. *Maude v. Rodes*, 4 Dana, 144.

Where one partner files a bill against his several partners for a settlement of the partnership accounts and his share of the profits, a fraud perpetrated by him on one of the defendants, in a former partnership between them individually, by means of which he procured the funds contributed as his share of the capital of the new firm, is no ground for annulling or rescinding the contract of partnership. *Ingraham v. Foster*, 31 Ala. 123.

(7) Colles, 442 (called *Harkness v. Steward*, and *Steward v. Harkness*, in the table of cases to the Dublin edit. of 1789).

of the capital of the firm, and that Pillans, who had been represented as a person acquainted with, and skilled in fishing, was, in truth, wholly ignorant of fishing, and of everything relating to the fishing trade. Harkness alleged that he confided in the management of Pillans and Stewart without suspicion until July, 1711, when he pressed Stewart to let him see the partnership accounts; that after many frivolous excuses he was shown many fine books, neatly bound, which he was told were the partnership books; that not being versed in accounts he took an accountant with him to examine them; but that to his surprise the books, when opened, were found to consist entirely of blank paper, without a word or figure written in them. Harkness thereupon, finding that he had been fraudulently drawn in and imposed upon by Pillans and Stewart, filed a bill against Pillans, Stewart and Denn, for a discovery of their transactions under the partnership, and for the recovery of his money. (*m*) The Chancellor decreed Stewart and Pillans to account for all moneys paid by the plaintiff to them or either of them, and to pay what should appear due to him with interest, the plaintiff to be absolutely discharged from the articles, agreements, and partnerships, Stewart and Pillans to indemnify him from all costs and damages whatsoever touching the articles, or any partnership in respect thereof, and to pay the costs of the suit. This decree was affirmed on appeal to the House of Lords.

\*A more recent case of the same description is *Rawlins v. Wickham* (*n*). There the plaintiff was induced by the misrepresentations of two persons, A. and B., to enter into partnership with them as bankers, and he and they, after carrying on their business for four years; transferred it to other parties. Shortly after this transfer, the plaintiff for the first time became aware of the falsity of the statements by which he had been induced to become a partner. He brought an action against A. and B. for their misrepresentations; pending the proceedings at law, A. died, but the action was continued

Although the plaintiff might have ascertained the truth.

*Rawlins v. Wickham.*

(*m*) The defendants relied on the lapse of time and laches and acquiescence on the part of the plaintiff; and particularly on the fact that he had entered into another agreement with them to the effect that the defendants should become partners in another fishing concern and share their profits in that with the plain-

tiff, and that such partnership had been entered into. The evidence, however, failed to show that the plaintiff had any knowledge of this alleged other partnership, or that he was aware of what had been going on, until shortly before he filed his bill.

(*n*) 1 Giff. 355, and 3 De G. & J. 304.

against B., and a verdict against him for damages was obtained. After the verdict B. became insolvent, and thereupon the plaintiff filed a bill against B. and the executors of A., praying that the partnership into which he had entered might be declared void, that the partnership articles might be cancelled, that the defendants might be decreed to repay him the sum paid by him on entering into the partnership, with interest, and to execute a sufficient indemnity against the outstanding debts and liabilities which the plaintiff had or might become subject to in respect of the dealings and transactions of the partnership, and for an account of such debts and liabilities, and of the monies already paid by the plaintiff on account of the partnership debts and for repayment of such monies with interest. A decree was made in the plaintiff's favor, and an appeal by A.'s executors was dismissed. In this case the deceased partner had clearly been a party to the misrepresentation; and although it was proved that he was ignorant of the real truth, and had not stated that to be true which he knew to be false, still it was held that he ought not to have stated what he did not know to be true, and that he was answerable for the falsity of his own assertions. It was also held that the plaintiff was entitled to assume that the statements made to him were true until he had reason to suppose that they were not; and that it was no answer to him that if he had examined the partnership books he would have discovered the true state of affairs (o).

\*930 \*Besides being called upon to rescind agreements for the formation of a partnership, Courts are frequently applied to by partners, or those claiming under them, to rescind agreements of other descriptions, and especially agreements come to on or after a dissolution.

Rescission of contracts made on a dissolution of partnership.

Supposing every member of a firm to be *sui juris*, any one may retire upon any terms to which he and his co-partners may choose to assent; and if there is no fraud or concealment on either side, all will be bound by any agreement into which he and they may enter, although it may ultimately turn out that a bad bargain has been made.<sup>1</sup>

Bad bargain not set aside if there has been no fraud.

(o) See, also, *Jauncey v. Knowles*, 8 W. R. 69, where there was also means of knowledge. Compare *Jennings v. Broughton*, 17 Beav. 234, and 5 De G. M. & G. 126, where the plaintiff did not

rely on the defendant's statements.

<sup>1</sup>A settlement of partnership accounts and the sale by one partner to another of his interest, fairly and deliberately made, and evidenced by their written

For example, in *Knight v. Marjoribanks* (*p*) certain persons were partners in a speculation in Australia. The speculation was not at first successful, and it was necessary for the partners frequently to contribute large sums of money for the purpose of carrying it on. The plaintiff, who was one of the partners, was greatly pressed for money, and was unable to contribute his proportion of the required capital. A sum of upwards of 5000*l.* was alleged to be due from him to the concern; he never questioned the accuracy of this statement, but assented to its correctness, and he never examined or sought to examine any books or accounts; and in consideration of the sum so alleged to be due, and of 250*l.* cash, he assigned all his interest in the concern to his co-partners, and released them from all demands. The speculation afterwards proving profitable, he sought to set aside this transaction on the ground of fraud and inadequacy of consideration. But as no fraud was proved, as the plaintiff knew very well what he was about, as he was content that no accounts should be taken, and that no person should act as his adviser, and as, although he was undoubtedly in distress, and his co-partners knew it, yet they had taken no unfair advantage of that circumstance, it was held both by Lord Langdale, and by Lord Cottenham on appeal, that the transaction was binding and could not be impeached (*q*).

\*Any arrangement which, on the principle here adverted to, is binding on the partners themselves, will also, as a general rule, be binding as between the trustee in bankruptcy or executors of the retiring partners on the one hand, and the continuing partners and their trustees or executors on the other. (*r*) But as regards trustees in bankruptcy, it must not be forgotten that they can set aside arrangements entered into in fraud of creditors,

agreement, signed and sealed, will not be set aside for slight and trivial reasons. *Gage v. Parmelee*, 87 Ill. 329.

Where partners in an iron furnace, through a third person, bought the interest of a fellow, concealing that the purchase was for them: *Held*, that this was not *per se* fraudulent; nor was his allegation in a bill in equity brought six years afterwards, that a fellow, at the time of the sale, represented the sel-

ler's interest as being of less value than it was, a ground for relief. *Gedde's Appeal*, 80 Pa. St. 442.

(*p*) 11 Beav. 322, and 2 Mac. & G. 10.

(*q*) See, also, *Ex parte Peake*, 1 Madd. 346; *Ramsbottom v. Parker*, 6 Madd. 5; *M'Lure v. Ripley*, 2 Mac. & G. 274; *Cockle v. Whiting*, Taml. 55.

(*r*) *Ex parte Peake*, 1 Madd. 346; *Ramsbottom v. Parker*, 6 Madd. 5; *Luckie v. Forsyth*, 3 Jo. & Lat. 388.

although such arrangements may be binding as between the parties to them and their respective executors. (s)

Notwithstanding the inability of a retiring partner, and of those claiming under him, to avoid an agreement fairly come to between him and his co-partners, the good faith and open dealing which one partner has a right to expect from another never require to be more scrupulously observed than when one of them is retiring upon terms agreed to upon the strength of representations as to the state of the partnership accounts; and an agreement entered into on a dissolution will be set aside if it can be shown to have been based upon error or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth. Thus, in *Chandler v.*

*Dorsett*. *Dorsett (t)*, the plaintiff and the defendant dissolved partnership; an account was drawn up by the defendant, who made it appear that there was a balance against the plaintiff. The plaintiff gave his note for the amount of this balance, and afterwards having discovered mistakes in the account, filed a bill for a new account. The defendant pleaded an account stated: but the Court decreed that the defendant should come to a new account, and that what should appear to be due on taking it should be paid with interest. So, in *Spittal v. Smith (u)*,

where the plaintiff was entitled to a share of the produce of a whaling voyage, and the defendant paid him a sum of money as his share, for which the plaintiff gave a receipt; \*932 it was held that as there had been concealment on \*the part of the defendant, the plaintiff was entitled to an inquiry as to whether certain deductions which had been made were proper.

As has been more than once observed in the course of the present treatise, the principles illustrated by the foregoing Arrangements with an expelled partner. decisions apply most strongly to the case of a partner who is expelled by the others. Powers of expulsion are always construed strictly, and unless they are exercised with perfect good faith, the expulsion will be declared void, and the partner wrongfully expelled will be restored to his position, and will not be held

(s) See *Anderson v. Maltby*, 2 Ves. J. 255; *Billiter v. Young*, 6 E. & B. 40; *Warden v. Jones*, 23 Beav. 497; *Heilbut v. Nevill*, L. R. 4 C. P. 354, affirmed

5 C. P. 478.

(t) *Finch*. 431. See, too, *Maddeford v. Austwick*, 1 Sim. 89.

(u) *Taml*. 45.

bound by accounts which may have been signed by him in ignorance of material facts. (*x*)

Hitherto the arrangement entered into, and afterwards called in question, has been supposed to have been made between the partners themselves. But more difficulty arises where an arrangement is entered into between the representatives of a deceased partner on the one hand, and the continuing partners on the other. Two cases have here to be considered, according as the representative of the deceased is or is not himself a partner in the firm.

Agreements made with the representatives of a deceased partner.

If an executor of a deceased partner is not a member of the firm, it is competent for him and the surviving partners to agree that the share of the deceased shall be ascertained in a particular way, or be taken at a certain value. And although it has been said that the creditors, or other persons interested in the estate of the deceased, may impeach such an agreement by instituting proceedings against the surviving partners and the executors of the deceased (*y*), still agreements of the kind in question cannot be successfully impeached, unless there has been some fraud or collusion between them and the executors. In *Davies v. Davies* (*z*) Lord Langdale observed:—

1. Where the representative is not himself a partner.

“It has been said in the course of the argument, that in a suit constituted as this is against the executor and surviving partner of the testator, for an account of the partnership transactions, it was not necessary to prove the fraud and collusion which are charged in the bill, and the case of *\*Bowsher v. Watkins* was cited in support of that proposition. I well recollect that there were special circumstances which induced Sir John Leach to come to the conclusion he did in that case, and that the decision was far from establishing the general proposition that in every case a bill might be filed against an executor and surviving partner of the testator without charging and proving fraud or collusion. In this case there are no special circumstances. It is a bill filed by persons beneficially interested in the testator's estate against the executor and the surviving partner, and it seeks to have the partnership accounts now. The defendant, the surviving partner, by his plea avers that an account was settled with the executor on the 31st of December, 1832, and that, if unimpeached, is a sufficient defense to the bill.”

*Davies v. Davies.*

\*933

Later cases are in conformity with this decision. (*a*)

(*x*) See *Blisset v. Daniel*, 10 Ha. 538; as to damages, see *Wood v. Woad*, L. R. 9 Ex. 190, noticed *ante*, vol. i, p. 851.

(*y*) See *Bowsher v. Watkins*, 1 R. & M. 277; *Gedge v. Traill*, *ib.* 281.

(*z*) 2 Keen, 534.

(*a*) *Chambers v. Howell*, 11 Beav. 6; *Stainton v. The Carron Co.* 18 Beav. 146; and as to accounts settled by one of several executors, *Smith v. Everett*, 27 Beav. 446.

If there has been fraud or collusion between the surviving partners and the executors of the deceased partner, the case naturally assumes a different aspect, and any arrangement between them will be liable to be set aside at the instance of the persons interested in the estate of the deceased. (b) And, even although there be no fraud or collusion, still, if the executor has obtained less than the true value of the deceased's share in the partnership estate, the executor may be liable as for a *devastavit*, although the surviving partner may be protected against all demands. But if, in a case of difficulty, the executor has acted with a *bond fide* view to do his best for the estate he represents, the Court will not be willing to make him account for what, without his willful default, he might have received from the surviving partners. (c)

If a partner dies and leaves his co-partner his executor, much greater difficulty is met with than in the case last supposed. By the present hypothesis the executor is invested with two characters, and his interest as surviving partner is often in conflict with his duty as representative of the deceased. This conflict of duty and of interest renders it almost impossible for the executor to enter into any arrangement with respect to the share of the deceased in the partnership estate which those interested in that share may not afterwards succeed in setting aside. (d)

In *Wedderburn v. Wedderburn* (e), a leading case on this subject, an account of a deceased partner's estate was directed after a lapse of thirty years, and repeated changes in the firm, and after several deeds and a release had been executed by the parties beneficially interested. The surviving partners were the executors of the deceased, and were guardians of the persons beneficially entitled to his share, and the settlements and releases were executed in ignorance of the true state of the partnership accounts. So in *Millar v. Craig* (f) where one partner died, leaving four executors, of whom two

(b) As in *Cook v. Collingridge*, Jac. 607; *Rice v. Gordon*, 11 Beav. 265. Less than fraud or collusion will justify an action against an executor of a deceased partner and the surviving partners, *Travis v. Milne*, 9 Ha. 141, but will not, it is apprehended, invalidate arrangements into which they may have en-

tered for payment of the share of the deceased.

(c) See *Rowley v. Adams*, 7 Beav. 395.

(d) See *Cook v. Collingridge*, Jac. 607.

(e) 2 Keen, 722, and 4 M & Cr. 41.

(f) 6 Beav. 433; in this case no question was raised as against the partners who were not executors.

were members of the firm; an account was settled between the executors and the residuary legatees, and releases were executed; but errors having been proved in the accounts, the releases were set aside, and the accounts were reopened. Again in *Stockton v. Dawson* (*g*), a partner by his will authorized a sale of his share to his co-partner, whom he appointed one of his executors. The surviving partner purchased the share of the deceased at a valuation, but the purchase was set aside at the suit of the son of the deceased, after a lapse of seven years. So in *Rice v. Gordon* (*h*), where a partner died, some of his co-partners obtained administration to his estate, and sold part of the assets of the deceased to another of the partners, but at an under value; the sale was set aside at the suit of a creditor.

In all these cases there was some ground for setting aside the arrangement made by the executors, in addition to the mere fact that they were also surviving partners. But, as observed by Lord Eldon in *Cook v. Collingridge* (*i*), "one of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question; and this is so difficult to do in a transaction in which they are dealing with themselves that the Court will not \*inquire whether it has been done or not, but at once says such a transaction cannot stand." (*k*)

However, a surviving partner who is the executor of his deceased co-partner, may retain out of his assets what is due from the deceased to himself on taking the partnership accounts. (*l*)

(b.) *Contracts to take shares in companies.*

The foregoing principles are as applicable to companies as partnerships; but in applying them to companies care must be taken not to lose sight of the rights of creditors; and for this purpose, it is necessary to distinguish companies which are being wound up from companies which are not in that position.

(*g*) 9 Beav. 239.

(*h*) 11 Beav. 265.

(*i*) Jac. 621.

(*k*) The position of the executors of the deceased partner will be examined at

length hereafter, and the subject above noticed will be again adverted to on that occasion.

(*l*) *Morris v. Morris*, 10 Ch. 68, where the accounts were still unsettled.

After the winding-up of a company has commenced, it is too late for a shareholder to repudiate his shares on the ground of fraud; even although that fraud may in point of law be imputable to the company, and may have been discovered since the winding-up commenced. This was decided in *Oakes v. Turquand* (*m*), and is settled law, and is based upon the ground that such fraud affords no answer to the claims of the creditors of the company.

But where the company is not being wound up, the right of a person who has been induced by the fraud of the company to take shares in it, to repudiate those shares and to be relieved from them is indisputable; provided 1, the fraud of which he complains is proved and is sufficiently material; and 2, he has not deprived himself of his right of repudiation by his own laches, or by conduct inconsistent with such right. (*n*)

Thus in *Kisch v. Central Railway Company of Venezuela* (*o*), the prospectus in effect stated, (1.) That the company had obtained a concession from a foreign government; (2.) That the contractor had guaranteed a dividend of two-and-a-half per cent. on the paid-up capital during the construction of the works, and (3.) That the foreign government had guaranteed a dividend of nine per cent. on the paid-up capital for twenty years. The real facts were (1.) That the company had for a large sum bought a concession made to another company; (2.) The contractors' guarantee was limited to 20,000*l.*, the capital of the company being 500,000*l.*; (3.) The government guarantee only came into operation in the event of the company failing, without any default of its own, to realize a profit of nine per cent. on its paid-up capital from its business. The memorandum of association empowered the company to purchase concessions, and the agreement for the purchase of the concession already obtained by others was referred to in the company's articles, but was not disclosed in them. The court held that the misrepresentations in the prospectus were such as to entitle a person taking shares on the faith of it to rescind his contract, although he was not entitled to rely upon his own ignorance of the memorau-

(*m*) L. R. 2 H. L. 325; *Kent v. Freehold Land Co.* 3 Ch. 493, reversing S. C. 4 Eq. 588.

(*n*) As to which, see *ante*, p. 114.

(*o*) 3 DeG. J. & Sm. 122; aff. L. R. 2 H. L. 99, under the name Directors of Central Rail. Co. of Venezuela *v. Kisch*.

dum and articles of association, and of what was there disclosed.

In *Smith v. Reese River Company* (*p*), the prospectus described some silver mines abroad which the company had contracted for, and proposed to work as extremely valuable, Smith v. Reese River Company. whereas in fact they were wholly worthless, and were afterwards given up by the company for others, which were more promising. The directors who issued the prospectus did not know that the mines referred to in the prospectus were worthless, they having themselves been duped; but the court held that a person who had taken shares on the faith of the prospectus was entitled to rescind his contract, and to have the company restrained from suing him for calls. (*q*)

In *Ross v. Estates Investment Company* (*r*), a prospectus was issued by the directors of a company after its formation, and the prospectus stated, falsely, that half the first issue of shares had been already subscribed for, and that the company had contracted for the purchase of two properties, on one of Ross v. Estates Investment Company. \*which the vendor had already spent 70,000*l*. A person \*937 who had been induced to take shares in the company on the faith of this prospectus, was held entitled to rescind his contract, to recover from the company the money he had paid to it for the shares, to have his name removed from the register of shareholders, and to have the company restrained from suing him for calls.

In *Henderson v. Lacon* (*s*) the prospectus stated, falsely, that the directors and their friends had subscribed a large portion of the capital; and a shareholder who had applied for and obtained shares on the faith of this prospectus, was held entitled to repudiate his shares and to have his money back, and to have his name removed from the register of members, and to be indemnified by the directors. Henderson v. Lacon.

Moreover, in such cases as these, the plaintiff is entitled to relief, although a petition to wind up the company may be presented after action brought. (*t*)

These cases may be conveniently contrasted with the following in which the misrepresentation relied upon was held not to be sufficiently material, or not to have been relied upon by the plaintiff so as to entitle him to relief. Fraud not material.

(*p*) L. R. 4 H. L. 64, and 2 Eq. 264.

(*r*) L. R. 3 Eq. 122, aff. 3 Ch. 683.

(*q*) See, as to the immateriality of

(*s*) 5 Eq. 249.

knowledge on the part of the directors that their statements were false, *ante*, pp. 319, 320.

(*t*) *Smith v. Reese River Co.* and *Henderson v. Lacon*, *ubi supra*.

In *Pulsford v. Richards* (*u*), the projectors of a Belgian railway issued a prospectus for the formation of a company, stating that they transferred to the company the concession obtained from the Belgian government, and all the benefits arising from it, subject to certain specified reservations in favor of the promoters for reimbursement of preliminary expenses. The plaintiff, acting on the faith of this prospectus, applied for and accepted shares in the company, but afterwards filed a bill against the projectors for a return of all moneys paid by him in respect of such shares, with interest, offering to return the shares and all dividends received on account of them. The grounds on which the plaintiff sought to rescind his contract were substantially: (1), that an arrangement had been made by the promoters with an engineer highly \*beneficial to him and detrimental to the company, and that this arrangement was in no way alluded to in the prospectus; and (2), that the promoters had appropriated to themselves 20,000 shares in the company, in addition to the benefits expressly reserved to them in the prospectus. The Court, however, held that there was no such fraud as was sufficient to enable the plaintiff to rescind the contract into which he had entered, and his bill was dismissed with costs. As regards the shares, the Court was of opinion that the directors took the shares *bonâ fide*, and that the number of shares allotted by them to themselves and the engineer was not a fact so material that the knowledge of it was a matter which the directors were bound to communicate to the public, in order to enable them to come to a sound conclusion as to the probable success of the undertaking in which they were invited to take a part. As to the concealed arrangement with the engineer, the Court came to the conclusion that the services performed and to be performed by him must have been performed by some one; that he was peculiarly well fitted to perform them; that supposing the remuneration agreed upon to have been excessive, still that would only entitle the shareholders to have the amount of excess paid by the directors themselves, and that the non-disclosure to the public of the agreement made with the engineer was not the suppression of a fact which affected the intrinsic value of the undertaking, or consequently afforded a sufficient ground for a rescission by the plaintiff of his contract to take shares in the company.

(*u*) 17 Beav. 87. See, also, *Heymann v. European Central Rail. Co.* 7 Eq. 154; *Kennedy v. Panama, &c. Mail Co. L.* R. 2 Q. B. 580.

In *Jennings v. Broughton* (*x*), the plaintiff, who had taken shares in a mining company formed by the defendants, sought to rescind the contract on the ground that he had been induced so to do by their representations. The misrepresentations consisted of exaggerated statements as to the value and prospects of the mine, contained in the report of an engineer employed by the defendants, and which report was submitted by them to the plaintiff. The plaintiff, however, did not \*altogether rely on this report, but went and examined the mine himself more than once, before he purchased the shares in it. The mine had undoubtedly been described in too glowing colors, and it by no means came up to the expectations formed of it; but the Court was of opinion, upon the evidence, that the plaintiff had not relied on what was represented to be actually existing, that he not only had had the same means as the defendants of ascertaining the truth, but that he had availed himself of those means, and that his deception was as much owing to his own error of judgment as to anything else. His bill therefore was dismissed, and with costs, and an appeal by him was also dismissed.

Statements not  
relied on by  
plaintiff.

*Jennings v.*  
*Broughton.*

\*939

In *Robson v. The Earl of Devon* (*y*), the plaintiff, a stock-broker, was induced by the secretary of a company, first to advance him 500*l.* on the security of 1000 *l.* shares, on each of which *l.* was certified to have been paid up; and secondly, to purchase 1200 other shares. On the failure of the company, the plaintiff sought to have both transactions declared void, and to obtain back from the company his 500*l.*, and the money paid for the purchased shares. The plaintiff rested his case against the company upon the following, amongst other grounds, viz.: First, that the company's prospectus showed that no shares ought to have been issued before a certain amount of capital had been subscribed; and secondly, that nothing had ever been paid in respect of the shares on which the 500*l.* had been advanced. But it was held that the plaintiff was entitled to no relief on either of these grounds. For, first, it was by no means clear that the capital required by the prospectus to be subscribed, had not in fact been subscribed; secondly, the plaintiff had not parted with his money on the faith of the prospectus, so that it was immaterial to

Prospectus not  
relied upon by  
plaintiff.

*Robson v.*  
*Devon.*

(*x*) 17 Beav. 234, and 5 DeG. M. & G. 126. See, also, *Small v. Attwood*, 6 Cl. & Fin. 232, where the plaintiff also

relied on his own judgment.

(*y*) 3 Jur. N. S. 567, and 4 ib. 245.

consider what was there stated; and thirdly, the shares on the security of which he lent his money, were, as between the holder and the company, to be taken as paid-up shares, and therefore it was of no consequence to the plaintiff, whether anything had actually been paid upon them or not.

Nor will the mere circumstance that the prospectus of a  
 \*940 \*company sets forth the value of the proposed undertaking in too glowing colors, enable a person to rescind a contract to take shares entered into on the faith of the statements contained in the prospectus. Contracts cannot be rescinded simply on the ground that sanguine expectations have been expressed by one person, and raised in the mind of another, and have not been ultimately realized. In a case in which a company was formed to work a patent, the value of which was grossly overstated in the prospectus, it was held that a person taking shares on the faith of such prospectus could not afterwards repudiate them. (z)

Again, the fraud relied upon as a ground for rescinding the contract must be clearly proved; and if there has been no positive misrepresentation and no intentional concealment, the circumstance that the plaintiff was in fact misled by what he was told and by documents furnished to him, will not entitle him to be relieved from his contract. This is well illustrated

by *Conybeare v. New Brunswick and Canada Railway Company*. (a) The material facts of this difficult case were shortly as follows:—The company was formed for the purpose of purchasing and carrying on a railway belonging to the St. Andrews and Quebec Railway Company, and of purchasing all the lands and property of that company, and all the rights of the holders of a certain class of shares (called A. shares) in it. The plaintiff applied for shares in the new company, and was informed by the Secretary that the A. shares were entitled to a preferential dividend of 6l. per cent., and that the holder of every A. share was entitled to four acres of land. The secretary also stated that the new

(z) *Denton v. Macneil*, 2 Eq. 352; and as to prospective advantages set forth in a prospectus, see *Hallows v. Fernie*, 3 Ch. 467.

(a) 7 H. L. C. 711, reversing S. C. 1 DeG. F. & J. 578, and affirming the decision of V.-C. Stuart in 6 Jur. N. S.

164. See, also, as to the necessity of clearly proving the fraud relied upon, *Robson v. Earl of Devon*, noticed above, and *Kennedy v. Panama, &c. Mail Co.* L. R. 2 Q. B. 580; and as to giving particulars of fraud, *McCreight v. Stevens*, 1 Hurls. & Colt. 454.

company had acquired some thousands of acres of land from the Colonial Government, and that all claims against the company were regularly liquidated every six weeks; and he gave the plaintiff reports from the \*directors, in which these and other \*941 matters, tending to show the prosperity of the company, were stated. The plaintiff was shown, and he examined the statutes of the Colonial Legislature, by which the lands were granted; and he took copies of all those statutes, except one, away with him. That one statute, which had been produced to the plaintiff, but which was not amongst those he took away, showed that the title of the company to the lands depended on the completion of the railway by a certain time. The effect of this statute was correctly stated in the company's articles of association, and there was nothing to show that it had been intentionally concealed from the plaintiff. It appeared, however, that the directors had been advised by counsel upon the effect of the statute upon the title of the company, and that his opinion was not communicated to the plaintiff.

Upon the faith of the above statements and reports, and of the statutes furnished to him, the plaintiff took shares in the new company; but before he had completed the purchase, he was informed that the manager abroad had exceeded his authority, and incurred debts to a considerable amount. The plaintiff, having afterwards discovered that the company was in fact greatly in debt, that its affairs were far from prosperous, and its title to the lands was not absolute but liable to forfeiture, insisted on rescinding his contract. This demand was not acceded to, and he consequently filed a bill to enforce it.

The Vice-Chancellor Stuart and the House of Lords were of opinion that no positive misrepresentation had been made, that no wilful concealment had been practiced with reference to the title to the land, and that the plaintiff had not been induced to take the shares upon the faith of that title being indefeasible. Great stress was deservedly laid upon the circumstance that the company's articles correctly recited the statute alleged to have been suppressed. The Vice-Chancellor refused, however, to dismiss the bill with costs, but in this respect his decision was reversed. (b)

(b) The Lords Justices held that the plaintiff was entitled to relief upon the grounds that the title of the company to the land had been represented to him as indefeasible, that he had been put off

inquiry by the statements so made to him, and that even if the acquisition of land was not the main inducement of the plaintiff in taking shares, it formed a material ingredient in the purchase.

942\* \*Upon the subject of the right to rescind a severable contract in part where it cannot be rescinded in toto the case of

Rescission of  
several con-  
tracts.

*Maturin v. Tredinnick* (c) is very important.

*Maturin v.*  
*Tredinnick.*

There the plaintiff had been induced by the fraud of the defendant to purchase from him several shares in several mining companies. Before the plaintiff had discovered the fraud he sold some of his shares in one of the companies. He afterwards filed a bill to rescind the contract as to all the remaining shares. Pending the suit one of the companies in which some of these shares were held, was ordered to be wound up; and the shares in one of the other companies were forfeited for non-payment of calls, but the defendant had full notice of the intended forfeiture. The Vice-Chancellor Wood held (1), that the sale of some of the shares before the bill was filed did not disentitle the plaintiff to rescind the contract as to the other shares; and (2), that neither the subsequent order to wind up one of the companies, nor the subsequent forfeiture of shares, afforded any defense to the suit.

Cases of repudiation on the ground of fraud must not be confounded with those noticed in an earlier part of the work, in which persons have been held not bound to take shares, in consequence of a departure from the scheme as advertised. (d)

If a director of a company is applied to for unallotted shares, and he transfers to the applicant shares already allotted to himself, he thereby commits a fraud which will enable the transferee to set aside the transfer, and to recover back what he may have paid for the shares. (e)

Director sell-  
ing his own  
shares as unal-  
lotted shares.

When a person has been induced by the fraud of some particular shareholder to purchase shares of him, the right of the person defrauded is to rescind the contract of sale, and to throw the shares back on the person from whom he took them, and to be indemnified by him against all losses

943\* \*sustained in consequence of having taken the shares. (f)

(c) 2 New Rep. 514, and 4 ib. 15. In this case the V.-C. is reported to have said that a sale of some shares in one of the companies would have afforded a defense to the suit as to the shares in the other companies. But *quære* how this is consistent with the relief actually given. See, further, *Curtis's case*, 6

Eq. 455.

(d) *Ante*, p. 106, *et seq.*

(e) *Blake v. Mowatt*, 21 Beav. 603.

(f) See *Stainbank v. Fernley*, 9 Sim. 556, and *Seddon v. Connell*, 10 Sim. 58 & 79, and *Maturin v. Tredinnick*, 2 New Rep. 514, and 4 ib. 15, *ante*, p. 942.

This is apparently the limit of the right of the person defrauded in such a case. (*g*) If the shares have been actually transferred to him, he is not entitled to have the transfer treated as null and void as between himself and the company; nor to restrain the company from making calls upon him whilst he is a shareholder. (*h*) He may be entitled to compel his vendor to accept a re-transfer of the shares, but even this right must, it is conceived, depend upon whether the company is being wound up or not, and upon the power of the directors to refuse to register transfers.

A charter which has been obtained from the Crown by fraud may be repealed by *scire facias*; but so long as it remains unrepealed its validity cannot be disputed. (*i*)

Chartered  
companies.

The right of a company to rescind a fraudulent contract entered into with its promoters has been already considered. (*k*)

#### SECTION VI.—ACTIONS FOR DISSOLUTION, ACCOUNT, ETC.

The remedy for a partner who insists on a dissolution which is opposed by his co-partners was formerly by a suit in equity, and is now by an action which should be brought in the Chancery Division of the High Court. (*l*) Actions involving the taking of partnership accounts should also be brought in the same division.

In an action for dissolution the statement of claim should \*claim a dissolution and an account, and also an injunction \*944 and a receiver to restrain the defendants from dealing with the partnership assets and from issuing bills or notes in the name of the firm. Such an action lies, although the partnership be a partnership at will and can therefore be dissolved by the plaintiff himself (*m*); but if the partnership has been dissolved before action, the plaintiff should claim a declaration to that effect. If the partner-

(*g*) An action for damages will lie, see *ante*, p. 717, but this is not so complete a remedy.

(*h*) *Bloxam v. Metropolitan Cab Co.* 4 New Rep. 51, is not opposed to this. For although the company was restrained from suing the plaintiff for calls, the plaintiff had not acquired any title to the shares, they having been transferred to him by a person who had

himself no title. The transfer was therefore wholly void.

(*i*) See *Macbride v. Lindsay*, 9 Ha. 574.

(*k*) See *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394, and other cases of that class noticed *ante*, vol. i. p. 584.

(*l*) Jud. Act, 1873, § 34.

(*m*) *Master v. Kirtton*, 3 Ves. 74.

ship is admitted and the right to dissolve is not contested, the Court will decree a dissolution on motion before the hearing or trial. (*n*)

An action for the dissolution of an ordinary partnership may be maintained, although the partnership is one which may be wound up under the statutory jurisdiction conferred by the Companies act, 1862 (*o*); but practically it is more convenient to have recourse to that act where it applies.

The grounds on which the Court will dissolve a partnership have been already considered (*p*); and the mode of winding up the affairs of a partnership in the event of death or bankruptcy will be examined in Book IV.; in the present place it is proposed to deal with the subjects of Account and Discovery, Injunctions, Receivers, Sale of Partnership Property.

### 1. *Of account and discovery.*

Under this head it is proposed to consider, with reference to partners and persons claiming under them—

1. The right to an account and discovery generally.
2. The defenses to an action for an account and discovery.
3. The decree for a partnership account.

\*945    *\*(a) Of the right to an account and discovery generally, as between partners and those claiming under them.*

1. *As to Account.*—The right of every partner to have an account from his co-partners of their dealings and transactions, is to obvious to require comment. An action for an account may be maintained by partners although the partnership accounts are not complicated (*q*), and although an action for damages may be sustainable (*r*).<sup>1</sup> Moreover, although formerly the

(*n*) *Thorp v. Holdsworth*, 3 Ch. D. 637, where the terms of the partnership were in dispute.

(*o*) *Jones v. Charlemont*, 16 Sim. 271; *Clements v. Bowes*, 17 ib. 167.

(*p*) As to fraud, see *ante*, p. 927. As to other grounds, see book i. ch. 3, § 2.

(*q*) *Cruikshank v. M'Vicar*, 8 Beav. 106. See *Frietas v. Dos Santos*, 1 Y. & J. 574.

(*r*) *Wright v. Hunter*, 5 Ves. 792, where the bill was for contribution. *Blain v. Agar*, 1 Sim. 37, and 2 ib. 289, where the bill was for the recovery back of deposits. See, too, *Townsend v. Ash*, 3 Atk. 336, as to the profits of partnership real estate.

<sup>1</sup> In matters of difficulty or controversy between partners, it is most usual, and by far the most convenient to resort

Court of Chancery would not entertain a suit for damages merely, although the suit was in form a suit for an account (*s*); yet in a

to a court of equity for their final adjudication and settlement. *Bracken v. Kennedy*, 3 Scam. 558.

To effect a complete adjustment of co-partnership concerns, the extraordinary powers of a court of chancery may be necessary; and when necessary for that purpose, it will entertain jurisdiction, whether an action of account would or would not lie between the parties. *Gillett v. Hall*, 13 Conn. 426.

The jurisdiction of courts of equity extends to the settlement of partnership accounts, however small may be the number of partners, where a court of law cannot make a complete and final adjustment of the partnership concerns, by reason of its inability to furnish the peculiar relief necessary for that purpose. *Niles v. Williams*, 24 Conn. 279.

A court of equity will not compel an account of partnership dealings, when a suit at law is pending, in which the same should be adjusted and settled, unless the aid of the court is necessary to ascertain the particulars of the account. *Hunt v. Gookin*, 6 Vt. 462.

A bill by one of a former partnership, against another, for a debt due on account stated, and not asking a settlement of partnership accounts, cannot be sustained until the plaintiff has exhausted his remedy at law. *Bethell v. Wilson*, 1 Dev. & B. Eq. 610.

On a bill in equity for an account between partners, the defendant's liability to account is a preliminary question in the cause, which should be decided by a decree for or against him, before reference to a master, on the general questions connected with their partnership transactions. *Collyer v. Collyer*, 38 Pa. St. 257.

During the pendency of a bill in equity by two of four partners against the other two for an accounting, the second two cannot bring a bill against the

first two for the same purpose. *Wallace v. Robinson*, 52 N. H. 286.

A bill in equity, filed by one partner against his insolvent co-partner in the business of carrying on a farm for one year, asking a settlement of the partnership accounts, and the foreclosure of a mortgage executed by the defendant partner on his share of the crop to be raised, to secure an individual liability to the complainant,—is not obnoxious to the objection that there is an adequate remedy at law; nor is it demurrable for multifariousness, although several purchasers from the defendant partners, of different portions of the crop at different times, are united with him as defendants. *Monroe v. Hamilton*, 47 Ala. 217.

A files a bill to enforce a vendor's lien against B, since deceased, and former partner of C and D, who, by cross-bill, set up a mechanic's lien for improvements made upon the land sold to B by A, while B was in possession, and a partner of C and D, in building and contracting: *Held*, that C and D cannot, as surviving partners of the old firm, settle in their cross-bill their partnership dealings with B's estate; but they can, with proper averments, put in issue and try such dealings for the purpose of showing how much they are entitled to receive of the debt due them as builders and material men. *Stammers v. McNaughten*, 57 Ala. 278. See *post*, 961, note.

See *Palmer v. Tyler*, 15 Minn. 106, as to when one partner will be entitled to an account, notwithstanding he has failed to pay in the whole sum agreed by him to be contributed.

(*s*) *Duncan v. Luntly*, 2 Mac. & G. 30, where shares had been wrongfully sold by the secretary of a company. See, also, *Clifford v. Brooke*, 13 Ves. 132.

partnership suit involving a general account, claims were adjusted which in ordinary cases would have formed the subject of an action at law (*t*); and it is apprehended that now the Court will in taking such an account deal with every claim which it may be necessary to investigate in order to adjust and finally settle the account.\* But disputes not affecting the account will naturally be excluded from it.

An account may be had by one partner<sup>3</sup> or his executors or ad-

(*t*) See *Bury v. Allen*, 1 Coll. 589; *Mackenna v. Parkes*, *ante*, p. 74, note (*n*). Compare *Great Western Ins. Co. v. Cunliffe*, 9 Ch. 525.

<sup>2</sup> Where an action is brought for the dissolution of a partnership, and an accounting, a court of equity having obtained jurisdiction of the cause may retain it for the purpose of doing complete justice between the partners, and to avoid a multiplicity of suits. *Shepherd v. Boggs*, 2 N. W. Rep. N. S. 370; S. C. 9 Neb. 257.

<sup>3</sup> A bill for accounting and a receiver, on dissolution, will be sustained, notwithstanding the partnership is a limited one, and the complainant the special partner. The latter has the same right as a general partner, to insist that the assets be applied to pay the partnership debts; and 1 Rev. Stat. 766, § 18, expressly entitles him to an accounting. *Hogg v. Ellis*, 8 How. Pr. 473. See, also, *Latting v. Fassman*, 29 La. Ann. 289.

A party who is a silent partner in a firm, and whose interest was kept concealed in order that it might not be attached by his creditors, may maintain a bill in equity for an account and settlement against the other partners who participated in the concealment. *Harvey v. Varney*, 98 Mass. 118.

If either of the partners, being without fault, can show that his adversary has violated the terms of the partnership contract, and abused the trust with which, as a partner, he was clothed, and that he has partnership assets that he has not accounted for, that showing

entitles such partner to an accounting. *Holladay v. Elliott*, 3 Oreg. 340.

Each partner is liable to account to every other for himself, and not for his co-partner; and no two partners are responsible to another jointly. *Portsmouth v. Donaldson*, 32 Pa. St. 202.

Where a partnership is alleged in a bill, and admitted by the answer, an account, as a general rule, is of course, unless the party has slept upon his rights. *Glenn v. Hebb*, 12 Gill & J. 271.

Although it is the general rule, where a partnership is alleged and admitted, to order an account of the partnership affairs, as a matter of course, unless the right of the complainant to relief is barred by the lapse of time, such account should not be ordered where it manifestly appears, from the proof, that the party asking the interposition of the court has no real cause of complaint, and that no good purpose or end can be accomplished by directing an account to be taken. *McKaig v. Hebb*, 42 Ind. 227.

Where the plaintiff files his complaint, alleging a partnership, and asking for an accounting by the defendant, if he does not establish the existence of the partnership, he will not be entitled to the accounting. *Salter v. Ham*, 31 N. Y. 321; *Arnold v. Angell*, 62 N. Y. 508. See, also *Adams v. Gaubert*, 69 Ill. 585; *Moffatt v. Moffatt*, 10 Bosw. 468; *White v. White*, 4 Md. Ch. 418. Compare *Perkins v. Perkins*, 3 Gratt. 364.

Under a bill, however, for an account and dissolution against three alleged partners, the complainant can have the

relief he is entitled to against the others though the proof shows that one of the alleged partners defendant is not in fact a partner. *Bass v. Taylor*, 34 Miss. 342.

A, B and C formed a partnership in which A and B were each interested one-fourth part and C one-half. At the same time D, the father-in-law of C, gave a written guaranty to A and B that C should fulfill all contracts the partnership should make in their business, to the extent of his interest in the partnership. The business was carried on under the management of C, as active partner for some years, when C removed to Canada and there died insolvent and intestate, before any dissolution of the partnership, leaving no property in this state, except such interest as he might have in the partnership concerns. There being no settlement of the partnership accounts, either between the partners themselves, or between the partnership and other persons, A and B brought their action at law against D on the guaranty, and during the pendency of the suit sought the interposition of a court of chancery, by a bill against D, stating these facts and averring that in order to have complete justice done in said action it was desirable, if not necessary, to have the accounts of the partnership fully settled, and praying for an adjustment of such accounts, and that such sum as should be found due from C to A and B, should be paid by D or be made the rule of damages in said action. On a demurrer to this bill, it was *held*, that such bill was not sustainable: 1. Because it did not appear from the facts stated that the plaintiffs could not have adequate redress in said action. 2. Because D was neither party nor privy to the partnership accounts. 3. Because, if the settlement sought were made it would not be conclusive upon D, nor equitable that it should be. 4. Because a court of equity will not extend the

liabilities of a surety beyond their legal limits. 5. Because no discovery was called for, no injunction sought, no mistake, accident, fraud or other ground of equitable relief alleged. *Bissell v. Ames*, 17 Conn. 121.

A complaint which sets forth a partnership between the plaintiff and defendant, a dissolution, the existence of unsettled accounts, and a balance in favor of the plaintiff, and demands an accounting, and judgment for the balance, shows a sufficient cause of action. *Ludington v. Taft*, 10 Barb. 447.

A petition in an action by one partner against another, which alleges the partnership, gives a copy of the written contract therefor, alleges that the plaintiff at the outset paid in a certain specified amount, that the partnership was terminated, and that during its existence plaintiff had paid on account of debts and expenses a large sum and that, upon a settlement of the partnership accounts which the plaintiff had vainly sought, a large sum would be found due the plaintiff, and which shows that the partnership owned a large number of chattles, and involved a series of transactions, states a cause of action, and is as good as against any objection that can be raised by demurrer, notwithstanding it does not in terms allege that defendant had possession of any of the partnership property, or that he had any accounts to render. *Carling v. Donegan*, 15 Kan. 495.

In a proceeding for a settlement of partnership accounts, a bill which did not show the existence of the partnership and did not contain any statement of the account by the plaintiff, nor ask for a statement by the defendant, was *held* defective. *Pope v. Salsman*, 35 Mo. 362.

A bill for a dissolution of partnership and an account cannot be sustained in that form, if the evidence shows that the members have been incorporated. *Benninger v. Gall*, 1 Cincin. 331.

A bill in equity, brought by a partner against his co-partner, for an account, etc., wherein it is averred that the defendant has all the partnership books and papers in his possession, or under his control, and refuses to permit the plaintiff to examine them, need not contain such certainty and particularity of statement as would be held necessary if the plaintiff had access to those books and papers. *Towle v. Pierce*, 12 Metc. 329.

A complaint of one partner against another, asking for judgment of a particular sum, forming a part of the partnership profits and not praying for an account of the partnership concerns, cannot be sustained. *Russell v. Byron*, 2 Cal. 86.

If in a bill by one partner against a co-partner he prays that his co-partner may be decreed to pay over to him one-half of the net profits of the partnership, such prayer is equivalent to a prayer for an account. *Bennett v. Woolfolk*, 15 Ga. 213.

A bill in equity by a partner for his balance in the co-partnership account, failing to allege that there are no liabilities, or that final settlement has been had; or, in case of dissolution, not asking for a marshaling of the assets, or for a final settlement, is, generally speaking, insufficient, and bad on demurrer. *Williamson v. Haycock*, 11 Iowa, 40.

Where, by agreement of the parties, one of the partners, on a dissolution of the partnership, is to make the collection of debts due the concern, a bill afterwards filed by the other partner against him for his share of the moneys collected, must allege when the collection was made, or it will be bad on demurrer. *McCament v. Gray*, 6 Blackf. 233.

In a bill by a co-partner to compel a settlement of the partnership accounts, the complainant, being administrator of

a deceased co-partner, may join with his own the claims of such deceased partner. *McLaughlin v. Simpson*, 3 Stew. & P. 85.

Where A and B entered into an agreement, by the terms of which B was to buy a tract of land of C, on which was a mill-seat and mill, and they were to build the mill anew; A was to do the work and B to furnish the material and money; and, out of the profits, they were to pay for the land, and reimburse B for his outlay, and pay the plaintiff for his work; and afterwards they were to share the profits or losses equally, as partners; and, in pursuance of the agreement, the land was bought, and the mill built, and became profitable, and B received the profits, reimbursed himself, and paid for the land: *Held*, that A was entitled to an account as a partner; and that it was not necessary that the contract should be in writing. *Falkner v. Hunt*, 73 N. C. 571.

If partners agree upon terms of dissolution, whereby one agrees to take the assets and pay the other a given sum and pay all the partnership debts, and the one so promising fails and refuses to perform his agreement to pay the other and the debts, that other, if subjected to loss by being compelled to pay debts, may repudiate the agreement and maintain a bill for an account according to his rights as they existed before the agreement. *Bailey v. Moore*, 25 Ill. 347.

A and B carried on a trade as partners, with the funds of A, in the name of B, who, without any dissolution of the co-partnership, or rendering any account to A, afterwards, without the consent of A, entered into partnership with C, and carried into the new concern all the funds of the former partnership. A, on the death of B, filed a bill against his administrator and C, his surviving partner, for a discovery and

ministrators (*u*)<sup>4</sup> against his co-partner or his executors or administrators (*v*). So by the trustees of a bankrupt Persons entitled to an account.

account: *Held*, that A was entitled to an account from C, of the transactions and profits of the partnership between him and B, and of the personal estate of the intestate, in his hands. *Long v. Majestre*, 1 Johns. Ch. 305.

The agent of one partner, coming in to possession of the effects, will be regarded as a trustee, and accountable in equity to the creditors of the firm and the other partners, though his principal has deceased and no administration has been granted. *Peterson v. Poignard*, 6 B. Mon. 570.

One who has subscribed to the articles of association of a land company, but has failed to pay in, on calls, the amount thereby required as a condition of membership is not as it seems, entitled to maintain a bill for account of profits, and for partition of lands unsold. *Stevenson v. Mathers*, 67 Ill. 123.

Where two persons made an agreement to form a partnership, but such partnership was never launched, and one of the parties proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other, and repudiating the partnership agreement; the latter's remedy is not for an accounting, but an action at law for breach of contract. *Powell v. Maguire*, 43 Cal. 11.

A person having a contract on public works entered into an agreement with another to form a partnership in the business under such contract and in other contracts that they might obtain. They completed such contract and divided the profits. After which the first gave notice that he would continue the arrangement no longer, but would bid on his own account. A subsequent contract was awarded to him, from which

he excluded the other: *Held*, that there was no partnership in the business under the last contract, and a bill for an account, &c., would not lie; that the remedy of the other party was at law for a violation of the agreement. *Doyle v. Bailey*, 75 Ill. 418.

(*u*) *Heyne v. Middlemore*, 1 Rep. in Ch. 138; *Hackwell v. Eustman*, Cro. Jac. 410.

<sup>4</sup>To the point that the surviving partner, to whom the settlement of the co-partnership affairs is left, can, upon the settlement of the co-partnership accounts, be compelled to account for the surplus or portion due the estate of the deceased, see *Stewart v. Burkholter*, 23 Miss. 396, and the cases hereinafter cited. See, also, *Roberts v. Kelsey*, 38 Mich. 602; *Sewell v. Humphrey*, 37 Vt. 263; *Scott v. Searles*, 13 Miss. 25.

The surviving partner of a firm must account to the representatives of a deceased partner for the property of the firm as it was at the time of the deceased partner's death. The representatives are entitled to an accounting absolutely, and need not show that there would be something due to them from the firm on settlement. Their right to an account results from their interest in the effects of the firm, and the liability of the estate to contribute to the payment of the firm debts. *Cheeseman v. Wiggins*, 1 Thomp. & C. 595. See, also, *Denver v. Roane*, 8 Reporter, 33; S. C. 99 U. S. 355.

A complaint, however, by the administrator of the estate of a deceased partner against the surviving partner, to recover the value of assets of the partnership, which the defendant has refused to account for, misapplied, and converted to his own use, it is held, should contain proper traversable averments

partner<sup>6</sup> against the solvent partner (*x*) or his executors (*y*). So a solvent partner may maintain an action for an account against the

that the partnership debts have been paid; that the affairs of the partnership have been finally settled; and that the shares of the partners have been ascertained; and should show a demand made, or a proper excuse for not making a demand, before the bringing of the action. *Krutz v. Craig*, 53 Ind. 561.

If surviving partners unreasonably delay in closing the partnership affairs or waste the property, the administrator of the deceased partner should, if the partnership creditors neglect so to do, file a bill calling the survivors to account, and praying for an adjustment of the partnership affairs. *Miller v. Jones*, 39 Ill. 54.

Where a surviving partner used the partnership funds, after a dissolution by the death of his former partner, in the business of a new partnership which he entered into with another: *Held*, that an action would lie by the administrator of the deceased partner for an accounting, against the survivor, or his representatives after his decease, and his last partner, and that the administrator could recover from the latter the amount found due from him to the first partnership. *Castly v. Towles*, 46 Ala. 660.

A surviving partner by misrepresenta-

tions and fraudulent dealing procured from the decedent's administratrix, who was also, as he knew, trustee for decedent's children, a conveyance of partnership interests belonging to decedent's estate, for much less than their reasonable value: *Held*, that the use of the property thus wrongfully appropriated must be regarded as a continued use of the partnership assets never accounted for, which the survivor might properly be decreed to make good to the administratrix on a bill brought by her for an accounting. *Heath v. Waters*, 40 Mich. 457.

A, B and C, who were partners as attorneys and counsellors-at-law, agreed that the general partnership between them should terminate March 18, 1869; that thereafter no new business should be received by the firm, and that any coming to it through the mails should be equitably divided. It was also stipulated that the business then in hand should be closed up as rapidly as possible by them "as partners under their original terms of association, and in the firm name." They agreed, Aug. 13, 1869, that in case of the death of either of them, his heirs or personal representatives should receive one-third of the fees in cases nearly finished, and twenty-

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<sup>6</sup> A partner may maintain a bill in equity against his co-partner and a third person, to recover his proportion of moneys paid to the defendant by the United States in accordance with a decision of the court of Commissioners of Alabama claims, under the U. S. Stat. of June 23, 1874, for property of the partnership destroyed by an insurgent cruiser, although after the destruction of the property and before the making of the treaty of Washington of 1871, the plaintiff was adjudged an insolvent

debtor under the laws of this commonwealth, and all his property was duly assigned to his assignee, if all the debts proved against the plaintiff's estate in insolvency, or existing at the time of the assignment have been paid, satisfied and discharged, and the assignee has signified his assent in writing to the maintenance of the bill in the name of the debtor. *Jones v. Dexter*, 125 Mass. 469.

(*x*) As in *Wilson v. Greenwood*, 1 Swanst. 471.

(*y*) As in *Addis v. Knight*, 2 Mer. 119.

trustees of his bankrupt co-partner; and, notwithstanding the rule against making mere witnesses parties, the bankrupt himself may,

five per cent. in other partnership cases. A having died, his executor filed his bill against B and C for a discovery, and to recover A's share in the fees received by them out of the partnership business which remained unfinished when the firm was dissolved: *Held*, That a court of chancery had jurisdiction to entertain the bill and power to decree the relief asked so far as the fees had been collected. *Denver v. Roane*, 99 U. S. 355.

A and B were partners, A carrying on the business of the firm in Boston, and B in New Orleans. A took in C as a partner in the business carried on in Boston, and A and B agreed in writing that after a settlement with C all the business in Boston should be settled by the articles of agreement between A and B. Real estate was afterwards acquired by A and C in Massachusetts and other States with partnership funds, and was agreed to be treated as partnership property. A died: *Held*, that the administratrix of his estate could not maintain a bill in equity to compel C to sell said real estate as surviving partner, and to account to her directly for the proceeds; but that B, as surviving partner of the original firm, had a right to insist on C's accounting with him therefor. *Shearer v. Paine*, 12 Allen, 289.

The surviving partner of a commercial firm is not liable as liquidator to account to the succession of his deceased partner for any single item of indebtedness to the succession, but to pay over the entire sum found to be due on the succession on the settlement of the partnership. *Walmsley v. Mendelsohn*, 31 La. An. 152.

Where a suit was brought by the heir of one of the members of a partnership against the heirs of the other member,

claiming a certain sum, and giving, in his petition, a detailed statement of the property belonging to the partnership, and of its annual revenues: *Held*, that if plaintiff had any right to the property described in his petition, and was, therefore, entitled to an account from the heirs of the surviving partner, his right, and the rendition of an account of the partnership affairs, could be determined in such a form of action as well as any other; and, that such a suit was in the nature of an action for the settlement of partnership affairs, and a partition and a division of the partnership effects. *Atkinson v. Rogers*, 14 La. Ann. 633.

One who is next of kin, or a legatee or creditor, cannot file a bill against the surviving partner of a testator or intestate, for the sole purpose of compelling him to account and settle the partnership accounts with the personal representative of the deceased partner. *Harison v. Righter*, 11 N. J. Eq. 389.

Upon the death of a partner, one of the surviving partners was made administrator: *Held*, that next of kin could not file a bill against the surviving partners for an account, there being no charge of collusion between the administrator and the other partners. *Hyer v. Burdett*, 1 Edw. Ch. 325.

The widow of a deceased member of a partnership is entitled to a discovery and account, from the surviving partner of all moneys belonging to her separate estate, received by her husband as trustee for her under the Code, and mingled by him with the partnership funds, and of all disbursements made by the partnership, and properly chargeable to her, and interest on the amount due her at the death of her husband. *Dent v. Slough*, 40 Ala. 518.

\*946 it is said, be made a defendant for the purposes \*of discovery (z). Again, if a partner's share is taken in execution, the purchaser from the sheriff is entitled to an account from the solvent partners, as is, also, the execution debtor himself (a).

An agreement to pay out of profits confers a right to an account; and servants entitled to a share of profits can maintain  
 Servants, &c. an action for an account of them (b).<sup>1</sup>

A sub-partner has no right to an account from the principal firm, or any members of it, except the one with whom he is  
 Sub-partners, &c. a sub-partner; for there is no contract or privity save between those two (c). It has even been said that if a partner charges or mortgages his share in favor of a creditor, the latter has no right to an account from the other partners of the profits to which their co-partner may be entitled. This, however, is not quite correct (d); and as regards partners in mines, it has been decided that a mortgagee of one partner is entitled to an account against the other partner (e). If a partner, with the consent of his co-partners, assigns his share in the partnership, the assignee will, by virtue of this assent, acquire the rights of the assignor, and be, therefore, entitled to an account from the other partners (f).<sup>2</sup>

(z) *Whitworth v. Davis*, 1 V. & B. 545. See *Mitford Pl.* 187, ed. 5.

(a) See *Habershon v. Blurton*, 1 De G. & Sm. 121; *Perens v. Johnson*, 3 Sm. & G. 419.

(b) See *Harrington v. Churchward*, 6 Jur. N. S. 576; *Rishton v. Grissel*, 5 Eq. 326; *Turney v. Bayley*, 4 DeG. J. & Sm. 332.

<sup>1</sup>One who is to receive a share of the profits of a business may maintain a bill in equity for an account thereof. *Bentley v. Harris*, 10 R. I. 434 (distinguishing *Hazard v. Hazard*, 1 Story, 371); *Hallett v. Cumston*, 110 Mass. 32, decided under Mass. Gen. Stat. ch. 113, § 2:

(c) *Brown v. De Tastet*, Jac. 284; *Raymond's case*, cited in *Ex parte Barrow*, 2 Rose, 225; *Bray v. Fromont*, 6 Madd. 5, and see *Killock v. Greg*, 4 Russ. 285, as to agents.

(d) See *ante*, p. 698.

(e) *Bentley v. Bates*, 4 Y. & C. Ex. 182.

(f) See *Fawcett v. Whitehouse*, 1 R. & M. 132; *Redmayne v. Forster*, 2 Eq. 467.

<sup>2</sup>Where one partner assigns his interest in the assets of an unsettled partnership to a third person, and draws an order upon his co-partner, directing him to pay over to the assignee all moneys that may due him on final settlement of the partnership affairs, the assignee is entitled to all the remedies for procuring a settlement which the drawer would have had against the drawee, if there had been no assignment; and he may maintain a bill for account against the drawee without making the drawer a party. *Fountaine v. Urquhart*, 33 Ga. (Supp.) 184. See, also, *Matthewson v. Clarke*, 6 How. 122; *Strong v. Clawson*, 5 Gilm. 346.

An assignee of an assignee of a co-partner in a joint purchase and sale of lands, may sustain a bill in equity against the other co-partners and the

If a partner dies, a question arises as to the right of his creditors and legatees to sue the other partners for an account of the share of the deceased. The creditors of the late firm <sup>Creditors, &c., of deceased partner.</sup> can maintain an action against the executors of the deceased and the surviving partners, in order to obtain payment of their debt out of the assets of the deceased (*g*). But the separate creditors, or the legatees, or next of kin of a deceased partner, stand in a very different position. In the absence of special \*circumstances, \*947 they have no *locus standi* against the surviving partners, but only against the legal personal representative of the deceased partner (*h*); and it is only when there is collusion between these persons, or when circumstances have occurred which preclude the representative from himself obtaining a decree for an account of the share of the deceased, that his separate creditors, legatees, or next of kin, may themselves file a bill for that purpose against the surviving partners (*i*).<sup>1</sup>

agent of the partnership, to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds. *Pendleton v. Wambersie*, 4 Cranch. 73.

One partner assigned his interest in the concern as security for a debt, but continued to be treated as a partner by the other partner: *Held*, that the first-mentioned partner might file a bill against the other partner and the assignees of his own share for an account of the partnership. *Buford v. Neely*, 2 Dev. Eq. 481.

A., and W. being partners, A., with the consent of W., transferred his interest to D., and D. and W. agreed to collect assets, and pay the debts of the old firm. Afterwards D. brought a suit against W. for a dissolution and an account: *Held*, that A. could not, upon petition, become a party to the proceedings for the purpose of securing his rights in the firm property. *Dayton v. Wilkes*, 5 Bosw. 655.

If a partner has transferred his interest in the partnership to a third person, such third person is a necessary party to a bill filed to settle the partner-

nership concern. *White v. White*, 4 Md. Ch. 418.

A bill was filed by one partner to settle the affairs of the partnership, which bill was supported by affidavits. The defendant appeared, and after appearance the complainant moved to amend the bill by making the assignee a party for the purpose of setting aside an assignment made by the other partner, and for a temporary injunction against the assignee and for a receiver: *Held*, that the bill would not be multifarious as amended, and the amendments were allowed on the usual terms. *Hayes v. Heyer*, 4 Sandf. Ch. 485.

(*g*) *Wilkinson v. Henderson*, 1 M. & K. 582, and see *post*.

(*h*) *Davies v. Davies*, 2 Keen, 534; *Travis v. Milne*, 9 Ha. 141; *Langley v. The Earl of Oxford*, 2 Amb. 798, *Blunt's ed.*; *Seeley v. Boehm*, 2 Madd. 180.

(*i*) See the cases last cited. This subject will be again alluded to.

<sup>1</sup> A bill filed by a member of a partnership, which has been dissolved, praying that a receiver be appointed to collect and receive the debts due and coming to the firm, that an account be taken of all

The account which a partner may seek to have taken, may be either a general account of the dealings and transactions of the firm, with a view to a winding up of the partnership; or a more limited account, directed to some particular transaction as to which a dispute has risen.

It was formerly considered that no account between partners could be taken in equity, save with a view to a dissolution (*k*), and a bill praying an account but not a dissolution has been held bad on demurrer (*l*). The reason alleged for this doctrine was, the impossibility of doing *complete justice* without winding up the whole concern, and ascertaining the final balances due to or from the partners respectively. This reason, however, is far from satisfactory, and it has been long felt that in their anxiety to do complete justice, courts of equity often refused relief in cases where their interference, to a limited extent only, would have been highly beneficial and was loudly called for. It has been felt, in short, that much more injustice frequently arose from their refusal to do less than complete justice, than could have arisen from their interfering to no greater extent than was desired by the suitor aggrieved. Accordingly, in *Prole v. Masterman* (*m*),

*Prole v. Masterman.*

\*948

where the promoter of a company sought to make his co-promoters contribute to a \*debt paid by him, but for which they were liable as well as he, it was held that a decree might be made without directing a general account of what was due from the plaintiff in respect of other matters. Again, in the case of a mutual insurance society, where the funds of the society are answerable for the payment of the moneys due upon their policies, an assured member is entitled to an account of what is due to him upon his policy, and to a decree

the partnership dealings and transactions, and that the other co-partners be compelled to pay the complainant what should appear, upon the taking of the accounts, to be due him from them, is a bill for the complete administration of the partnership property, in which the creditors of the firm are interested; and a decree granting relief is for their benefit as well as for the benefit of the parties to the suit, and they have a right to insist upon its execution, though not made parties in the bill, and after such

a decree is entered the suit cannot be dismissed without their consent. *Udlike v. Doyle*, 7 R. I. 446.

(*k*) *Forman v. Homfray*, 2 V. & B. 329; *Knebell v. White*, 2 Y. & C. Ex. 15; *ante*, p. 894.

(*l*) *Loscombe v. Russell*, 4 Sim. 8.

(*m*) 21 Beav. 61. Compare *Munnings v. Bury*, Tam. 147. The circumstance that an action for contribution would lie, did not oust the jurisdiction of a court of equity. *Wright v. Hunter*, 5 Ves. 792.

for the payment of what is so due, without involving himself in any general account of the dealings and transactions of the society, or seeking for a dissolution thereof (*n*).

The old rule, therefore, that a decree for an account between partners will not be made save with a view to the final determination of all questions and cross claims between them, and to a dissolution of the partnership, must be regarded as considerably relaxed, although it is still applicable where there is no sufficient reason for departing from it.<sup>1</sup>

Cases in which an account will be decreed, although no dissolution is prayed.

There are three classes of cases in which actions for an account, without a dissolution, are more particularly common, and to which it is necessary specially to refer. These are—

1. Where one partner has sought to withhold from his co-partner the profit arising from some secret transaction.

2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner or to drive him to a dissolution.

3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all.

1. Where one partner has obtained a secret benefit, from which he seeks to exclude his co-partners, but to which they are entitled, they can obtain their share of such benefit by an action for an account, and such action is sustainable, although no dissolution is sought. The cases illustrating this

1. Account where one partner withholds what the firm is entitled to.

(*n*) See *Bromley v. Williams*, 32 Beav. 177; *Hutchinson v. Wright*, 25 Beav. 444; *Taylor v. Dean*, 22 Beav. 429. See, too, *Robson v. McCreight*, 25 Beav. 272.

<sup>1</sup> See *Hudson v. Barrett*, 1 Pars. Sel. Cas. 414.

In a bill for an account, where both parties agree that the business is at an end, and that the subject-matter of the agreement is extinguished, and both seek an accounting, disputing only as to the principles on which it shall be taken, the court, in disposing of the cause after trial, may well disregard the want of an averment that the partnership has been dissolved, or of a prayer for a decree of dissolution, even if such an averment and

prayer are technically necessary. *Fairchild v. Valentine*, 7 Robt. 564.

Where one partner filed his bill for a dissolution of the partnership, praying for an account, and showing that on a particular day the partnership would expire: *Held*, that although the prayer for an account was premature, but became proper in a short time afterwards, no additional statement was necessary; the defendant also praying that the business of the firm might be closed; and as the business was conducted by one alone, that it was his duty to keep an account; and that he might be examined on oath as to all the partnership transactions. *Funk v. Leachman*, 4 Dana, 24.

doctrine have been already noticed at length (*o*), and it will therefore be sufficient here to state that an account was directed,  
 \*949 although \*the plaintiff did not seek to have the partnership dissolved, or its affairs wound up, in

Hichens *v.* Congreve, 1 R. & M. 150, *ante*, p. 581.

Fawcett *v.* Whitehouse, 1 R. & M. 132, *ante*, p. 579.

Beck *v.* Kantorowicz, 3 K. & J. 230, *ante*, p. 581.

The Society of Practical Knowledge *v.* Abbott, 2 Beav. 559, *ante*, 591.

In all the other cases of this class, except Clegg *v.* Fishwick (*p*), in which a dissolution was prayed, the report is silent as to whether a general winding up was sought or not.

With reference to cases of this description, it may be observed that where the benefit which the plaintiffs assert their right to share has not yet been obtained, but only agreed for by their co-partners, the plaintiffs have no *locus standi* against the person with whom the agreement has been entered into by those partners, and cannot therefore restrain such person from performing that agreement. The proper course for the aggrieved partners to take is to proceed against their co-partners, and claim from them the benefit of the agreement into which they have entered. (*q*)

2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner, or to drive him to a dissolution. In cases of this description an account has been directed, although no dissolution has been asked.

The general proposition that courts of equity would interfere under the circumstances now supposed, was laid down by Sir John Leach in Harrison *v.* Armitage (*p'*), where, however, no account was directed, inasmuch as the evidence did not establish a partnership.

But in Chapple *v.* Cadell (*s*) an account was directed at the suit of a minority where the majority had sold a partnership newspaper to a stranger, and some of the more active of the majority had then entered into a fresh agreement with the pur-

(*o*) *Ante*, p. 571 *et seq.*

(*p*) 1 Mac & G. 294.

(*q*) See Alder *v.* Fouracre, 3 Swanst. 489, where an injunction was granted restraining the executors of a deceased partner who had agreed for a renewal

of a lease from disposing of the lease when granted, except for the benefit of the partnership.

(*r*) 4 Madd. 143.

(*s*) Jac. 537.

chaser to carry on the paper in partnership with him. *Richards v. Davies* (t) went a step further. \*There a partnership had been entered into for a term of years which was still unexpired. The defendants would come to no account with the plaintiff respecting the partnership dealings and transactions, but on the application of the plaintiff a decree for an account of all past transactions was made. Sir John Leach, in pronouncing judgment, observed that the plaintiff had no relief at law for money due to him on a partnership account; that if a court of equity refused him relief, he would be wholly without remedy; and in answer to the objection that if such a suit were entertained the defendant might be vexed by a new bill whenever new profits accrued (u), his Honor asked what right would the defendant have to complain of such new bill if he repeated the injustice of withholding what was due to the plaintiff?

*Richards v. Davies.*  
Defendant refusing to account.

*Fairthorne v. Weston* (x) is another authority in point. In that case two solicitors entered into partnership for a term of years, and before the term expired the defendant conducted himself in such a way as to prevent the possibility of the partnership business being carried on. The defendant's object was to compel the plaintiff to dissolve. The plaintiff, however, instead of dissolving, filed a bill for an account of the partnership dealings and transactions since the last settlement, and for a receiver. The defendant insisted that the plaintiff was entitled to no relief except with a view to a dissolution; but the Court held otherwise, and observed that there was no universal rule to the effect that a bill, asking for a particular account but not for a dissolution, was demurrable; and that if there were any such rule, a person fraudulently inclined, might, of his mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.

*Fairthorne v. Weston.*  
Defendant seeking to drive plaintiff to dissolve.

Again, where a person seeks to establish a partnership with another who denies the plaintiff's title to be considered a partner, if the former is successful upon the main point in dispute, an account of the past dealings and transactions will be

Other cases.

(t) 2 R. & M. 347.

(u) This objection was made by Lord Eldon in *Forman v. Homfray*, 2 V. & B. 330; by V.-C. Shadwell in *Loscombe*

*v. Russell*, 4 Sim. 8; and by Baron Alderson in *Knebell v. White*, 2 Y. & C. Ex. 15.

(x) 3 Ha. 387.

\*951 \*decree, although the plaintiff does not seek for a dissolution of the partnership which he has proved to exist. (y) Upon the same principle it is apprehended, that if a partner is wrongfully expelled, and he is restored to his status as partner by the judgment of the Court, an account will be directed, but the partnership will not necessarily be dissolved. (z)

As regards mines it has also been decided, that if one co-owner excludes another from his share of the profits, an account will be directed, although no dissolution is prayed. (a) But as each co-owner of a mine can sell his share without the consent of the other owners, there is no occasion for him to ask for a dissolution, and the case of a mine is therefore, perhaps, not an apt illustration of the doctrine in question.

3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all, such an account will be directed, although a dissolution is not asked for.

3. Account where the concern has failed.

The leading case in support of this proposition is *Wallworth v. Holt*. *worth v. Holt* (b), in which Lord Cottenham, in an elaborate and justly celebrated judgment, overruled a demurrer to a bill by some of the shareholders of an insolvent joint-stock bank, on behalf of themselves and others, against the directors, trustees, and public officer of the company, and certain shareholders who had not paid up their calls, praying that an account might be taken of all the partnership assets, and that the outstanding assets might be got in by a receiver, and that the whole might be converted into money, and applied towards the satisfaction of the partnership debts. In delivering judgment the Lord Chancellor observed,—

“When it is said that the Court cannot give relief of this limited kind, it is I presume, meant that the bill ought to have prayed a dissolution, and  
\*952 \*a final winding up of the affairs of the company. How far this Court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say any-

(y) *Knowles v. Haughton*, 11 Ves. 168, as reported in *Collyer on Partn.* 198, note. The defendant, however, did not resist the account after the question of partnership was decided against him.

(z) See *Blissett v. Daniel*, 10 Ha. 493, where the bill prayed for a dissolution,

but no dissolution was decreed. In the case of an incorporated company this point cannot arise, *Garden Gully Co. v. McLister*, 1 App. Ca. 39, is an instance.

(a) *Bentley v. Bates*, 4 Y. & C. Ex. 182. See, also, *Redmayne v. Forster*, 2 Eq. 467.

(b) 4 M. & Cr. 619.

thing beyond what is necessary for the decision of this case; but there are strong authorities for holding that, to a bill praying a dissolution, all the partners must be parties (c); and this bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be—the one binding the Court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to the bill praying it—that the door of this Court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law. "

In *Wallworth v. Holt*, the bill was filed for the sole purpose of having the assets of the company applied in payment of its joint debts; it did not pray an account of the partnership dealings and transactions, for the purpose of obtaining a division of the profits (if any) amongst the persons entitled thereto. If it had, probably a decree would have been refused, either because a dissolution ought to have been asked, or because all the shareholders were not parties to the bill. (d) But since *Wallworth v. Holt* other cases have been decided, in which bills praying for a division of the surplus assets amongst the shareholders, but not expressly praying for a dissolution, have been held good on demurrer. (e) The case which has gone furthest in this direction is *Sheppard v. Oxenford* (f); for there every kind of relief which would have been required in the event of a dissolution was prayed for, although a dissolution in terms was not asked. In *Sheppard v. Oxenford*, a number of persons formed an association for working mines in Brazil. The defendant was the sole trustee of the property, and the sole director. Disputes having arisen, a bill was filed by a shareholder on behalf of himself and all the other shareholders against the defendant for an account of the moneys received and paid by him on behalf of the association, and for \*an account of its debts, and for their payment out of the \*953 available assets, and for a sale, if necessary for that purpose, of part of the property, and for a division of *profits*. The bill also prayed an injunction to restrain the defendant from selling or disposing of the property, and for a receiver to get in the debts due to

Later cases.

*Sheppard v. Oxenford.*

(c) See as to this, *ante*, p. 881.

(d) See *Richardson v. Hastings*, 7 Beav. 323, and 11 ib. 17; *Deeks v. Stanhope*, 14 Sim. 57, which were similar cases to *Wallworth v. Holt*.

(e) See *Apperley v. Page*, 1 Ph. 779; *Wilson v. Stanhope*, 2 Coll. 629; *Cooper v. Webb*, 15 Sim. 454, and *Clements v. Bowes*, 17 ib. 167.

(f) 1 K. & J. 491.

the association, and to manage the affairs thereof, until the accounts were taken, but no dissolution was asked. A demurrer to this bill was put in and overruled (*g*), and an injunction was granted restraining the defendant from selling or disposing of the property otherwise than in the ordinary course of business; and a receiver and manager of the property in this country was appointed. It is to be observed that, although this was a case of a mine, the mine was in a foreign country, and was, strictly speaking, partnership property, and not merely so much land belonging jointly or in common to several co-owners.

Having regard to the decisions in *Sheppard v. Oxenford*, and other modern cases of a similar kind, especially *Apperly v. Page* (*h*) and *Clements v. Bowes* (*i*), it is conceived that the doctrine established in *Wallworth v. Holt* may be considered as extending not only to cases where an account is sought for the purpose of having joint assets applied in discharge of the joint liabilities, but also to cases where an account is sought for the additional purpose of obtaining a division of the surplus assets and *profits* amongst the persons entitled thereto. If this be so, the last remnant of the doctrine that, in partnership cases, there can be no account without a dissolution, must be considered as swept away, at least as regards partnerships the members of which are too numerous to be made parties to the action.

Similar in many respects to the class of cases last referred to, are those in which an unsuccessful attempt has been made to form a company, and the shareholders seek an account of the application of the money subscribed, and for a return of the whole or part of their subscriptions.

Before the Judicature acts courts of equity interfered at the suit of the subscribers of bubble companies, and compelled the \*projectors to return the deposits, not only in cases of fraud (*k*), but also where there was no fraud. (*l*) Since the Judicature acts an action for this purpose can clearly be maintained; and in such action the Court will, if necessary, direct an account of the moneys received, and of the expenses properly in-

(*g*) See 1 K. & J. 501.

(*h*) 1 Ph. 779.

(*i*) 17 Sim. 167.

(*k*) As in *Colt v. Woolaston*, 2 P. W. 154; *Blain v. Agar*, 1 Sim. 37, and 2 ib. 259. See, too, *Green v. Barrett*, 1 Sim.

45; *Cridland v. DeMauley*, 1 DeG. & S. 459; *Hallows v. Fernie*, 3 Ch. 467, reversing S. C. 3 Eq. 520.

(*l*) As in *Harvey v. Collett*, 15 Sim. 332.

curred by the managers, and payment out of the deposits of those expenses, and a distribution of the surplus; and it will interfere by injunction, and by appointing a receiver in the meantime, although no dissolution is asked. (*m*)

A claim for an account need not contain an offer by the plaintiff to pay what, if anything, may be found due from him on taking such account. (*n*) It is, however, usual to insert such an offer.

Offer by plaintiff to pay what is due from him.

An action for an account of partnership dealings is not objectionable, simply because it relates to the dealings of several partnerships, if they, in point of fact, are nothing more than continuations of one firm. (*o*)<sup>1</sup> But an action which involves the taking of an account of the dealings and transactions of two co-existing firms, may be open to objection on the ground of practical inconvenience. (*p*)

Action for account of several partnerships.

Before the Judicature acts a bill in equity against two persons praying for relief against one, and in the event of the plaintiff not being entitled to relief against him, then

Alternative cases.

(*m*) *Cooper v. Webb*, 15 Sim. 454; *Wilson v. Stanhope*, 2 Coll. 629; *Ap- perly v. Page*, 1 Ph. 779; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew, 684, where demurrers to such bills were overruled. See, too, *Sheppard v. Oxenford*, 1 K. & J. 491, *ante*, p. 952, and *Butt v. Monteaux*, 1 K. & J. 98.

(*n*) *The Colombian Government v. Rothschild*, 1 Sim. 103.

(*o*) See *Jefferys v. Smith*, 3 Russ. 158.

<sup>1</sup> When a partnership is dissolved by the death of a partner, and the survivors enter into a new partnership, and undertake to settle the affairs of the old partnership, in an action for dissolution of the new partnership, the affairs of the old may be investigated. *Burchard v. Boyce*, 21 Ga. 6.

A complaint filed to compel a partnership account, if it contain sufficient to call upon the defendant for an accounting as to one branch of the partnership business, though insufficient as to the other branch of their business, will not be bad on a general demurrer to the whole complaint. *Young v. Pearson*,

1 Cal. 448.

On a bill brought by a partner against his co-partners for account and settlement as to a branch of the business which had been discontinued, and in respect to which the partnership had been dissolved, and also for a share of profits in a second branch of the business, not discontinued, but in active progress, and in respect to which the partnership still subsisted, the jury having found, in effect (and this finding being supported by the evidence), that the suit when commenced was groundless as to both branches of the business, a verdict in complainant's favor for a share of the profits which, pending the suit, accrued from the latter branch, was held illegal; more especially as the bill did not seek, nor the verdict provide for, a dissolution of the subsisting partnership, a final settlement of the accounts, a discontinuance of the business, or a disposition of the assets. *Wadley v. Jones*, 55 Ga. 329.

(*p*) See *Rheam v. Smith*, 2 Ph. 726.

for relief against the other, was demurrable. In *Seddon v. Connell* (q), a bill was filed by a person who alleged that he had been induced by the fraud of directors to buy shares; and the relief prayed was, that it might be declared that the purchase was void as between the plaintiff and the company, and that the \*company might be ordered to repay the plaintiff his purchase money, with interest; *or*, in the event of the Court not thinking the plaintiff entitled to such relief, then that the purchase money might be repaid by the directors who had been guilty of the fraud. A demurrer to the bill was allowed, on the ground that it ought to have shown a direct, and not a contingent, right to relief against each defendant against whom relief was sought, and to have prayed accordingly. How far this rule still prevails cannot be considered as settled. (r)

In an action for a partnership account, if the partnership is admitted, and there is in fact nothing in dispute between the parties except the accounts, an order directing them may be applied for and obtained before the hearing of the action. (s)

2. *As to discovery and production of documents.*—The right of every partner to a discovery from his co-partner of all matters relating to the partnership dealings and transactions is as incontestable as his right to an account; and such right, like the right to an account, devolves upon and is enforceable against a partner's legal personal representatives and trustees in bankruptcy. How far discovery can be required from an alleged partner who denies the partnership alleged, will be examined hereafter; in the present place it will be sufficient to allude to a few points of practical importance arising where the right to discovery is not denied.

A party to an action for an account is often required to discover and set forth in answer to interrogatories, details which it is impossible for him to remember, and to ascertain which inquiry and study are necessary; but all that he is bound to do is, it seems, to furnish the interrogator with every means of information possessed or obtainable by himself, leaving the interrogator to make what he can of the materials thus furnished to him. The party interrogated is not bound to digest accounts, nor to set

(q) 10 Sim. 79.

2 Ex. D. 301, with *Evans v. Buck*, 4 Ch.(r) See Ord. xvi. rr. 3 and 6, and compare *Honduras, &c. Co. v. Lefevre*,

D. 432.

(s) *Turquand v. Wilson*, 1 Ch. D. 85.

out voluminous accounts existing already in another shape, and which he offers to produce. Thus, in *Christian v. Taylor* (*t*), in which the executor of one deceased \*partner filed a bill for an account against the executors of another deceased partner, and required them to set out in detail many complicated and voluminous accounts, it was held that they were not bound to do so; that they were under no obligation of going through the books for the purpose of giving the plaintiff the information which he asked; and that the defendants could not be compelled to do more than to refer to the books and documents in their possession in such a way as to entitle the plaintiff to have them produced for his inspection. (*u*)

Where, however, there are specific questions, it is not sufficient to refer generally to books and say that, save as therein appears, no answer can be given. The person answering must go a step further, and point out where in particular the information required by each interrogatory is to be found. (*x*)

A person interrogated, moreover, is bound to state what he knows, to make inquiries of his agents and servants, to obtain documents to the possession of which he has a right, and to afford his opponent either the information sought, or all the means of obtaining information which the answerer himself possesses. (*y*) A person who has it in his power to obtain information cannot escape from discovery simply by saying he does not know. In *Taylor v. Rundell* (*z*), the executors of a lessor of a mine filed a bill against the lessees for a discovery of the ground opened, and for an account of the produce. The defendants were two of the directors of the company by which the mine was worked. The defendants put in an incomplete

(*t*) 11 Sim. 401.

(*u*) See, too, *Lockett v. Lockett*, 4 Ch. 336; *White v. Barker*, 5 DeG. & Sm. 746; *Seeley v. Boehm*, 2 Madd. 176. A defendant is not entitled to set out the accounts sought for in a book, and to refer to the book instead of scheduling the accounts to the answer. See *Telford v. Ruskin*, 1 Dr. & Sm. 148.

(*x*) *Drake v. Symes*, Johns. 647. See, as to taking oppressive interrogatories off the file, S. C. 2 DeG. F. & J. 81, and generally on this subject *Wigram*

on Discovery, 165-169.

(*y*) As to what accountants' reports, &c. are privileged, see *Walsham v. Stainton*, 2 Hem. & M. 1; *Wilson v. Northampton & Banbury, &c. Rail. Co.* 14 Eq. 477. As to setting out a list of the debtors to the firm, see *Telford v. Ruskin*, 1 Dr. & Sm. 148, where it was held that such a list must be given. Compare the observation of V.-C. Wood in *Drake v. Symes*, Johns. 651.

(*z*) 11 Sim. 391, and Cr. and Ph. 104.

\*957 \*answer, stating, by way of excuse for so doing, that certain accounts were in possession of the company's agent in America; that the copies furnished by him were in the custody of the secretary of the company, that the defendants had no power to inspect the accounts except by an order of the Board, or, as shareholders, at certain short and specified times; and that the plaintiffs had, by means of an agent appointed for that very purpose, equal facilities and powers with the defendants to obtain the information desired. The answer was held insufficient, first by Vice-Chancellor Shadwell, and afterwards by Lord Cottenham, on appeal; the former holding that the defendants ought to have stated that they had applied to the agent abroad; and the latter holding that it ought to have appeared in the answer that the Board of Directors had been applied to for leave to procure and give the information required, and that such leave had been refused. Lord Cottenham added, "If it is in your power to give the discovery, you must give it; if not, you must show that you have done your best to procure the means of giving it." (a)

In another suit between the same parties for similar objects, but relating to another mine (b), the defendants again put in an incomplete answer, excusing themselves on the ground that the books and documents containing the information sought to be obtained were in the possession of the secretary as the agent of the company, and that the directors had ordered him not to allow the defendants to see the books; but this was held insufficient by the V.-C. Knight Bruce, and by Lord Cottenham, on the ground that the defendants had a *right* to see the books, and that they were bound to exercise that right, and if necessary, to file a bill for the purpose of enforcing it. Lord Cottenham there said.

"A party is bound to inspect and answer as to the contents of all documents that are in his \*possession or *power*; and all which he has a *right* to inspect, provided he can enforce that right, are in his *power*."

Books and papers which are in the possession of a company are, for purposes of discovery, in the possession or power of the directors, and they cannot avoid giving a list of

(a) See, too, *Stuart v. Lord Bute*, 11 Sim. 442, and 12 ib. 460; *A.-G. v. Rees*, 12 Beav. 50; *Earl of Glengall v. Fraser*, 2 Ha. 99, and compare *Martineau v. Cox*, 2 Y. & C. Ex. 638, where it was held that a partner here in a firm carry-

ing on business in a foreign country, was not bound to set out a list of documents in the possession of the partners abroad.

(b) *Taylor v. Rundell*, 1 Y. & C. C. 128, and 1 Ph. 222.

the documents of the company by saying that they, the directors, have none. (c)

In case it becomes necessary for a person interrogated to remove obstacles thrown in his way, he should apply for further time to answer, and not put in an answer, which is insufficient. (d)

In connection with this subject it may be useful to remind the reader of the rule, that a person cannot be compelled to *produce* books<sup>1</sup> which belong to himself and others Production of Documents. who are not before the Court. Thus in *Murray v. Walter* (e), the defendant in his answer stated, that certain books relating to a concern in which the plaintiff claimed to be a partner with the defendant were in the possession of the treasurer of the concern on behalf of the several shareholders in it, many of whom were not parties to the suit; and it was held that the defendant could not be compelled to produce the books in question, although it was insisted on the authority of *Walburn v. Ingilby* (f), that the plaintiff

(c) *Clinch v. Financial Corporation*, 2 Eq. 271.

(d) *Taylor v. Rundell*, 1 Ph. 222; *Pickering v. Rigby*, 18 Ves. 484.

<sup>1</sup> In an action between partners for an accounting, either is entitled, at any stage of the action, to an order requiring the production of all partnership books, and the papers and accounts relating thereto, and their deposit with the clerk to be inspected and copied. *Stebbins v. Harmon*, 17 Hun, 445; *Kelly v. Eckford*, 5 Paige, 548.

In the settlement of an account between partners, the parties have the same rights before the circuit court as before a master, in regard to the production of books, examination upon interrogatories, etc. *Montanye v. Hatch*, 34 Ill. 394.

Where partnership accounts are referred to a commissioner for settlement, the court will rule the parties to produce before him such books and papers as relate to the partnership, and direct him to disregard any matter therein which relates to the private affairs of the parties. *Calloway v. Tate*, 1 Hen. & Munf. 9.

A and B, being partners in trade, mutually agreed that A should devote his attention to one kind of business, and B to another, and that all the profits and losses accruing from both kinds should be equally shared between them: *Held*, on a bill in chancery brought by A, after the death of B, against his administrators, for the account-books kept by B, that these facts alone evinced no title in A to the partnership effects, and the bill was dismissed. *Canfield v. Hard*, 6 Conn. 180.

In an action by the executors of a partner who had conveyed all his interest in the firm to the other partner, to set aside the releases and conveyances, it was held that the plaintiffs were not entitled to a general inspection of the books of the firm before judgment, they being the exclusive property of the defendant as long as the sale stood. *Platt v. Platt*, 61 Barb. 52; S. C. 11 Abb. Pr. N. S. 110.

(e) Cr. & Ph. 114. The interest of the absent parties must be stated, *Bovill v. Cowan*, 5 Ch. 495.

(f) 1 M. & K. 79.

had a right to have whatever access to the books the defendant himself was entitled to. There are several other decisions to the same effect as *Murray v. Walter* (*g*), but the doctrine there laid down does not apply to cases in which the absent parties interested in the books are in fact represented by the defendants on the record, and have no interest in conflict with theirs; (*h*) nor is it said to an action by a *cestui que trust* against a trustee who is charged with trading with trust moneys in partnership with other persons not before the Court. (*i*)

If the plaintiff has agreed to accept the defendant's statement of profits, and not to investigate his books and accounts, the defendant will not be compelled to produce them before the hearing of the action. (*k*)

A person who obtains an order for the production of documents is entitled not only to inspect them himself, but to have them inspected by his solicitors and agents. (*l*) But neither he nor they are entitled to make public the information they obtain by means of such inspection. The order is made with a view to the administration of justice between the litigant parties; and an injunction will, if necessary, be granted to restrain the communication to strangers of what may be ascertained in the course of an examination of the books and documents produced under the order. (*m*)

The common order does not entitle the person in whose favor it is made to inspect by a professed accountant specially appointed for the purpose; but if there is any necessity for so doing, a special order for inspection by such a person will be made. (*n*)

Books in use for daily business are ordered to be produced at the

(*g*) *Hadley v. M'Dougall*, 7 Ch. 312; *Reid v. Langlois*, 1 Mac. & G. 627; *Burbidge v. Robinson*, 2 Mac. & G. 243; *Penney v. Goode*, 1 Drew. 474; *Stuart v. Lord Bute*, 13 Sim. 453. Compare *Vyse v. Foster*, 13 Eq. 602.

(*h*) *Glyn v. Caulfeild*, 3 Mac. & G. 463.

(*i*) See *Vyse v. Foster*, 13 Eq. 602, which, however, turned on the sufficiency of an affidavit of documents. See *Freeman v. Fairlie*, 3 Mer. 43.

(*k*) *Turney v. Bayley*, 4 D. G. J. & S. 332.

(*l*) *Williams v. Prince of Wales' Life, &c. Co.* 23 Beav. 338.

(*m*) *Ibid.*

(*n*) *Bonnardet v. Taylor*, 1 J. & H. 383. In *Draper v. Manchester and Sheffield Rail. Co.* 7 Jur. N. S. 86, L. J. an unsuccessful attempt was made to compel a company to submit to an inspection of its books by an accountant of a rival company.

place where they are usually kept; and they will not be ordered to be deposited with the record and writ clerks, unless there is some special reason for so doing. (o) Books in constant use.

When an order is made against a company for the inspection of its books, and the directors will not allow them to be produced, an order for their production will be made against the directors personally. (p) Inspection of books of corporations.

\*3. *As to payment into court.*—If, in an action by one partner against another for an account, the defendant admits in his answer that he has in his hands money belonging to the firm, or that he had such money, and ought to have it still, he can be compelled to pay such money into court before the hearing of the action. (q) As a general rule, however, a partner having partnership moneys in his hands, cannot be made to pay those moneys into court if he insists that on taking the accounts a balance will be found due to him. (r) Nor will he be compelled so to do unless the other partners will pay in what they may have in their hands. (s) Nor will a partner be ordered to pay into court the amount of a debt due from him to the firm, if the amount to which he is indebted is not admitted, and can only be ascertained by a complicated calculation. (t) But if a partner admits that he has partnership moneys in his hands, and it appears from his own statements that they came there improperly (u), or in violation of good faith, he will be compelled to pay them into court (x); so if he admits facts from which it appears

(o) *Mertens v. Haigh*, Johns. 735.

(p) *Lacharme v. Quartz Rock Mining Co.* 1 Hurls. & Colt, 134. As to the form of an order for production by a corporation, see *Ranger v. Great Western Rail. Co.* 4 DeG. & J. 74.

(q) In *White v. Barton*, 18 Beav. 192, an admission by one partner that he and his co-partner who was not a party had money in their hands was held sufficient.

(r) *Richardson v. The Bank of England*, 4 M & Cr. 165. But in *Birley v. Kennedy*, 6 N. R. 395, a partner who admitted that he had drawn out more than he ought was ordered to pay the excess into court.

(s) *Foster v. Donald*, 1 J. & W. 252.

(t) See *Mills v. Hanson*, 8 Ves. 68.

(u) See *Costeker v. Horrox*, 3 Y. & C. Ex. 530, where a surviving partner, being also the executor of his deceased co-partner, was ordered to pay into court 7000*l.* the amount of assets of the deceased improperly applied to partnership purposes. See the next note.

(x) *Jervis v. White*, 6 Ves. 738; *Foster v. Donald*, 1 J. & W. 252; in the first of these cases the motion was made before answer. In *Hichens v. Congreve*, 1 R. & M. 150, note, and *Gaskell v. Chambers*, 26 Beav. 360, directors obtaining secret benefits for themselves were ordered to pay the

that he is indebted to the firm in a certain sum, and he does not insist that on the whole the firm is indebted to him, the money admitted by him to be due will be ordered into court. (y)

\*961 \*If the partnership debts are unpaid, and the defendant is liable to be sued for them, the order directing payment into court should reserve to him liberty to apply for payment out of court, of the amount of the debts he may be compelled or pressed to pay. (z)

(b.) *Of the defenses to an action for an account and discovery between partners and persons claiming under them.*

The defense on the ground of illegality, of fraud, of laches on the part of the plaintiff, and of want of proper parties to the suit, have already been examined. (a) In addition, however, to these grounds of defense, there are others which require notice,<sup>1</sup> and which cannot

moneys received by them into court. Compare *Hagell v. Currie*, 2 Ch. 449, where the liability of the defendants did not sufficiently appear.

(y) *Toulmin v. Copland*, 3 Y. & C. Ex. 643; *Costeker v. Horrox*, 3 Y. & C. Ex. 530. In *Domville v. Solly*, 2 Russ. 372, an order was made though the defendants insisted that the plaintiff was entitled to nothing.

(z) *Toulmin v. Copland*, 3 Y. & C. 643. In S. C. 6 Price, 405, it was held that a surviving partner was not entitled to have partnership funds, on which the plaintiffs had put a *distringas*, transferred to him to enable him to pay outstanding debts.

(a) See, as to illegality, *ante*, p. 201 *et seq.*; as to fraud, *ante*, p. 923 *et seq.*; as to laches, *ante*, p. 902 *et seq.*; as to parties, *ante*, p. 877 *et seq.*

<sup>1</sup>A cross-bill is not necessary in a suit between partners, wherein the complainant seeks a dissolution and an account from the defendant, to enable the latter to get an account from the former, or to obtain relief against fraudulent practices of the complainant in giving the note of the firm without consideration, for his own benefit, and in buying

up the paper of the concern at a discount, for his advantage with a view to obtaining the full amount thereof out of the assets of the firm. Such a bill will not be sustained on demurrer. *Johnson v. Butler*, 31 N. J. Eq. 35. See, *ante*, 945, note.

In a suit for the settlement of partnership accounts, the parties defendant are entitled to an investigation of all transactions claimed as partnership matters, although they be not set forth in the pleadings by way of counter-claim. *Boyd v. Foot*, 5 Bosw. 110.

It is no defense to a bill for an account and settlement of a partnership that the defendant has been injured by the failure of complainant to perform his stipulations contained in the articles of partnership. The remedy of the defendant is at law, on the agreement. *Boyd v. Mynatt*, 4 Ala. 79.

Where one partner sues the other for a liquidation and balance due on partnership account, the defendant cannot set up in re-convention, damages to the business of the partnership caused by the bad habits of the plaintiff. *Mills v. Fellows*, 30 La Ann. 824.

In an action to recover the balance of

be more conveniently alluded to than in the present place, and under the following heads.

1. Denial of partnership.
2. Statute of limitations.
3. Account stated.
4. Award.
5. Payment, and accord and satisfaction.
6. Release.

1. *Denial of partnership*.—An action by one partner against another for an account of the dealings and transactions of an alleged partnership may be met by the denial of the existence of any such partnership.<sup>(b)</sup><sup>a</sup> This defense is relied upon as a reason for not answering interrogatories or mak-

a partnership account, the accounts current rendered by each of the partners to the others are admissible in evidence to show, by the admissions of the parties, that the items of such accounts are not items of partnership account. *Barry v. Barry*, 3 Cranch C. Ct. 120.

A assigned all his interest in the partnership effects to his co-partner B, who was to settle up the business, take a reasonable pay for his trouble in so doing, and divide any balance then remaining between them: *Held*, that in a suit by A against B, B should be allowed to show the value of his services in settling up the business. *Pierce v. Cumberly*, 19 Ind. 157.

(b) *Drew v. Drew*, 2 V. & B. 159; *Hare v. London and North-Western Rail. Co.* John. 722, is an instance in which a bill was successfully met by a plea denying that the plaintiff was a shareholder in the company.

<sup>a</sup> In a suit for an account of an alleged partnership, a plea denying the partnership must be supported by an answer and discovery as to every circumstance charged in the bill as evidence of the partnership, or the plea will be bad. *Everitt v. Watts*, 10 Paige, 82; S. C. 3 Edw. 486.

In a suit for an account of an alleged

partnership, it was referred to a master by consent, to state the accounts without prejudice: *Held*, that the existence of the partnership could not be questioned by an exception to the master's report finding a partnership, though that question was not expressly referred to him, and that the proper method of contesting the question would have been to bring the cause on for hearing. *Jones v. Jones*, 1 Ired. Eq. 332.

Where a bill set out a partnership, giving its duration and kind, and the answer denied generally, and then admitted, a partnership of the kind described in the petition, but alleged a different time and duration, claiming that it was dissolved: *Held*, that there was no issue as to the existence of the partnership, and that an accounting might be taken by a special referee. *Lannan v. Clavin*, 3 Kan. 17.

To a bill in equity for an account of sales of a book alleged to have been published by the defendant on the joint account of the plaintiff and himself, an answer which denies that any such book was published during the time alleged, and asserts that the book published by the defendant was a different one, need not render an account of sales. *Armstrong v. Crocker*, 10 Gray, 269.

ing a discovery of documents must be accompanied by statements on oath denying those allegations which, if true, would establish the partnership, and denying the possession of documents relevant to the question of partnership or no partnership. (c) In \*962 *Mansell v. Feeney* (d) it was held that the plaintiff was entitled to an inspection of all documents admitted by the defendant to be in his possession and to be relevant to the matters in question in the suit, although the defendant denied the partnership alleged by the bill, and also denied that the documents in question tended to prove its existence. The defendant, however, was allowed to seal up those parts of the books which he swore had no relation to the matters in question.

Before the Judicature acts it was a rule in equity that except in one or two cases a defendant could not by answer (as distinguished from a plea), protect himself from giving discovery; if he answered at all he had to answer fully. (e) This rule, which no longer exists (f), was often productive of great hardship; but in conformity with it, a person sued for a partnership account was not allowed by answer to deny the alleged partnership, and excuse himself on that ground from setting forth accounts, or producing documents which the plaintiff required to see. (g) However, notwithstanding this rule, the Court in more than one instance declined to enforce it; and ordered applications for discovery in such cases to be postponed until after the necessity for making them appeared (h); and as now a court, or judge at chambers, can order any question in dispute to be tried before any other (i) a person denying an alleged partnership can easily be protected against a vexatious or oppressive exercise of a right to discovery. Whilst on the one hand he must give all such discovery as bears upon the question of partner-

(c) *Mansell v. Feeney*, 2 J. & H. 313; *Harris v. Harris*, 3 Ha. 450; *Sanders v. King*, 6 Madd. 61.

(d) 2 J. & H. 320. See, also, *Saull v. Browne*, 9 Ch. 364.

(e) See *Elmer v. Creasy*, 9 Ch. 69.

(f) Ord. xxxi. r. 8.

(g) *Hall v. Noyes*, 3 Bro. C. C. 483; ——— *v. Harrison*, 4 Madd. 252; *Shaw v. Ching*, 11 Ves. 303; *Somerville v. Mackay*, 16 Ves. 382; *The Great Luxembourg Rail Co. v. Magnay*, 23 Beav. 646; *Reade v. Woodrooffe*, 24 ib.

421; *Blackley v. Rymer*, 4 Drew. 248; *Mansell v. Feeney*, *ubi supra*; *Thompson v. Dunn*, 573; *Saull v. Browne*, 9 Ch. 364.

(h) *Clegg v. Edmondson*, 8 DeG. M. & G. 787; *De LaRue v. Dickinson*, 3 K. & J. 336; *Lockett v. Lockett*, 4 Ch. 336; *Great Western Coll. Co. v. Tucker*, 9 Ch. 376; *Carver v. Pinto Liette*, 7 Ch. 90, *Wier v. Tucker*, 14 Eq. 25.

(i) Ord. xxxvi. r. 3. See, also, order xxxi, r. 19, and *Re Leigh's estate*, 6 Ch. D. 256.

ship or no partnership, he would not, it is apprehended, be compelled to set out accounts or produce documents which he swears \*throw no light on that question and can only be \*963 material after it has been decided in favor of the plaintiff.

2. *The Statute of Limitations*.—The Statute of Limitations, 21 Jac. 1, c. 16, § 3, enacts that all actions of account (other than for such accounts as concern the trade of <sup>2. Statute of Limitations.</sup> merchandise between merchant and merchant, their factors and servants (*k*)) shall be commenced and sued within six years next after the cause of such action or suit. A court of equity was as much bound by this statute as a court of law (*l*),<sup>1</sup> and advantage

(*k*) This exception no longer exists. See 19 & 20 Vict. c. 97, § 9. See, as to the exception, *Robinson v. Alexander*, 8 Bli. N. S. 352, and 2 Cl. & Fin. 717, and the cases there referred to.

(*l*) *Knox v. Gye*, L. R. 5 H. L. 656; *Foley v. Hill*, 1 Ph. 399; *Hovenden v. Annesley*, 2 Sch. & Lef. 607; and see *Whitley v. Lowe*, 25 Beav. 421, and 2 DeG. & J. 704.

<sup>1</sup> See *McKeown v. Guild*, 12 Chicago Leg. News, 18; *Stout v. Seabrook*, 30 N. J. Eq. 187; *McClung v. Copehart*, 24 Minn. 17; *McKelvey's Appeal*, 72 Pa. St. 409.

Though lapse of time is allowed to prevail sometimes in equity, it is (in those cases where the statute does not expressly or impliedly include courts of equity in its terms) only in analogy to the plea of the statute of limitations at law; and it cannot be allowed in favor of one partner in possession of real estate purchased with partnership funds, against the other, for the possession of one is the possession of both. *M'Guire v. Ramsey*, 9 Ark. 518. See, also, *Hall v. Clagett*, 48 Ind. 225. See *ante*, *Laches*, p. 902.

Where a former partner and brother, having been a bookkeeper of the firm, had been in constant correspondence with his brother since the dissolution, had received from him from time to time a settlement of the accounts be-

tween them, had been perfectly satisfied with this settlement, and knew that the balance was against him; upon bill filed to open the accounts, more than twenty years having elapsed since the dissolution of the firm, and nearly that period before filing the bill, *held*, that the lapse of time would be almost conclusive evidence of satisfactory adjustment between the parties. *Farrar v. Shepherd*, 60 Tenn. 190.

To render the lapse of the statutory period a bar to an action for an account by one partner against another, it must appear that the account has been closed for six years. *Stout v. Seabrook*, 30 N. J. Eq. 187.

Where the accounts between partners have been closed for six years, and there has been acquiescence for that period without fraud, the statute constitutes a bar; but the statute affords no defense in a case where there have been dealings within six years. *Todd v. Rafferty*, 30 N. J. Eq. 254.

The statute does not begin to run against each item of an account between partners, from the time it becomes a part of the account, but if part be within six years it draws that which is before after it. *Todd v. Rafferty*, *supra*.

When, after dissolution, the partners continue closing up the business, receiving and paying out money, the cause of action is deemed to have accrued at the

could be taken of it by plea (*m*), or by answer (*n*), or by demurrer if the facts sufficiently appeared on the face of the bill. (*o*)

Thus, where an account had been stated between two partners, and a balance was found due to one of them from the other, and twenty-four years afterwards a bill was filed by the former against the latter for discovery and an account, a plea that, according to the plaintiff's own showing, the balance was due twenty-four years before the filing of the bill, and that his remedy was barred by the statute, was allowed. (*p*)<sup>2</sup> In a subsequent case the defendant insisted in his answer that none of the transactions in respect of which the account was sought occurred within six years before the filing of the bill, and the bill was thereupon dismissed. (*q*) So, where a partner died, and seventeen years afterwards a bill for an account was filed \*against his executors by the surviving partners, the bill was dismissed with costs. (*r*)<sup>1</sup>

*Foster v. Hodgson.*

Again, in *Foster v. Hodgson* (*s*), the case was, in substance, as follows: there was a running account be-

date of the last item received or paid out. No demand is necessary before suit brought. *McClung v. Copehart*, 24 Minn. 17.

(*m*) See *Welford v. Liddel*, 2 Ves. S. 400; *Beames' Pleas* in Eq. 161. In *Robinson v. Field*, 5 Sim. 14, and *Jones v. Pengree*, 6 Ves. 580, the plea was overruled as covering too much.

(*n*) As in *Martin v. Heathcote*, 2 Eden, 169; *Tatam v. Williams*, 3 Ha. 347.

(*o*) *Foster v. Hodgson*, 19 Ves. 180; *Hoare v. Peck*, 6 Sim. 51; *Prance v. Simpson*, Kay, 678.

(*p*) *Bridges v. Mitchell*, Bunb. 217. See, too, *Whitley v. Lowe*, 25 Beav. 421, and 2 DeG. & J. 704.

<sup>2</sup> A bill will not be entertained to establish a partnership between two persons, settle its dealings, and declare one of them a trustee for the benefit of the other as to purchases of real estate, when more than twenty years have elapsed since the accrual of the right before suit brought, during all of which period the

defendant denied and disregarded the rights of the other alleged partner; and the fact that the partners were brothers, complainant being averse to litigation, and on that account failing to sue in time, will not alter the case. *Phillipi v. Phillipi*, 61 Ala. 41.

(*q*) *Martin v. Heathcote*, 2 Eden, 169, and see *Barber v. Barber*, 18 Ves. 286. These cases were overruled by *Robinson v. Alexander*, 2 Cl. & Fin. 717, on the ground that they came within the exception relating to merchants' accounts, although there was no item on either side within six years. That exception, however, no longer exists.

(*r*) *Tatam v. Williams*, 3 Ha. 347.

<sup>1</sup> See *Ray v. Bogart*, 2 John. Cas. 432.

Where one partner dies, however, neither the statute of limitations nor the equitable bar commence running in favor of the surviving partner until administration has been taken out on the estate of the deceased partner. *Spann v. Fox*, 1 Ga. Dec. 1.

(*s*) 19 Ves. 180.

tween a firm and its bankers; the head of the firm died, and the account then stopped, but was not formally adjusted or settled; twelve years afterwards, a bill was filed against the bankers for an account, on the ground that a considerable balance was, in fact, due from them to the firm. The defendants demurred, and the demurrer was allowed, on the ground that the case did not appear to be within the exception relating to merchants' accounts; that consequently the lapse of more than six years since the account stopped, was an answer to the suit; and that as this fact appeared on the face of the bill, the objection was properly taken by demurrer. (*t*)

Lastly, in *Knox v. Gye* (*u*), it was held, that a suit by the executors of a deceased partner against a surviving partner was barred by the lapse of six years where there was nothing to prevent the statute of limitations from running.

*Knox v. Gye.*

But the statutes of limitations do not apply to cases of express trust<sup>2</sup> or of concealed fraud. Therefore, if a partner has died, having by will disposed of his property on trust for payment of his debts, this is sufficient to justify a decree for an account of partnership transactions in respect

Cases where the statute affords no defense.

(*t*) See, too, *Hoare v. Peck*, 6 Sim. 51, and *Prance v. Sympton*, Kay, 678.

(*u*) L. R. 5 H. L. 656.

<sup>2</sup> Partners *inter sese* are trustees as to firm property held by them after dissolution, but the trust is implied, not express. Hence, actions between them relating thereto are subject to the statute of limitations. *Coudrey v. Gilliam*, 60 Mo. 86; *McKeown v. Guild*, 12 Chicago Leg. News, 18 (a surviving partner).

The statute does not necessarily begin to run from date of dissolution. Its operation commences with a breach of trust by the partner having partnership property on accounts in charge. And as a general rule the breach takes place after a failure to account and settle within a reasonable time after dissolution, and must be ascertained from the particular circumstances of each case. Where an account has been stated between them at the close of the partnership, the statute, as to the items embraced therein, runs from the time of

the statement. Where mutual arrangement, after dissolution, delegates to one member the collection of debts due the firm, no cause of action accrues against him in favor of his co-partner, nor does the statute begin to run, so long as a faithful discharge of that duty postpones a final settlement. *Coudrey v. Gilliam*, *supra*; *McNair v. Ragland*, 3 Murph. 139.

In 1865, after June 1st, a partner retired, selling out to his co-partner his interest (one-half) in the stock, at cost or invoice prices. The retired partner died, and in October, 1866, administration was granted upon his estate. A suit was commenced against the administrator in August, 1873, by the former partner of the intestate upon a certain award, to which suit the administrator pleaded, in January, 1874, among other things, that at the time of the dissolution the stock was worth over fifteen hundred dollars, and that he, the administrator, claimed to be entitled to one-half thereof with

of which claims existed when he died, although more than six years have elapsed since that time, and before the commencement of the action. (x) Again, in cases of breach of trust and of fraud, there seems to be no limit to the time at which a court will interfere and afford redress to the parties aggrieved. The mere lapse of thirty or forty years since the right first accrued, is insufficient to bar the remedy in such cases.

In *Stainton v. The Carron Company* (y), the management of the affairs of a company was entrusted to a person who was entitled to one-sixth of the shares in it. He was the \*manager of the company from 1808 until 1851, when he died. For twenty-five years he rendered accounts regularly, and these accounts were never questioned during his life. But after his death, it was discovered that upwards of 2000*l.* a year for many years had not been properly accounted for by him, and the company claimed from his estate nearly 70,000*l.* in respect of this annual deficiency, and asserted a lien for this sum on his shares and assets in the hands of the company. Notwithstanding the lapse of time, and the reception without dispute of the accounts sent in by the manager from year to year, a decree was made, opening the whole account from the year 1825 down to his death. (z)

Again, several modern acts of Parliament limit the duration of a retiring shareholder's liability to creditors to three years after his retirement; but it does not, therefore, follow that the duration of his liability to contribute with his late co-shareholders to debts for which he was liable with them, is also limited to the same three years. (a)

With respect to accounts between partners, an important alteration of the law has been effected by the repeal of so much of the old statutes as relates to merchants' ac-

interest. He neither offered expressly to set off the claim, nor prayed judgment therefor. The action and plea remained pending until February, 1877, when the action was voluntarily dismissed by the plaintiff therein. The administrator in July thereafter filed the present bill to recover for his intestate's interest in the stock. The bill was held to be barred by the statute of limitations, and a demurrer containing that

ground, among others, was held to have been properly sustained. *Crane v. Barry*, 60 Ga. 362.

(x) *Ault v. Goodrich*, 4 Russ. 434.

(y) 24 Beav. 346.

(z) See, too, *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Wedderburn v. Wedderburn*, 2 Keen, 722, and 4 M. & Cr. 41.

(a) *Gouthwaite's case*, 3 Mac. & G. 187.

counts. The authorities which have been already referred to as showing that the statutes of limitations are a bar to an action for an account did not apply to open unsettled accounts, extending from a time more than six years before a bill was filed, down to a time within such six years. Formerly, by reason of the express exception in the statute of James, accounts which concerned the trade of merchandize between merchant and merchant might be taken, although more than six years had elapsed since the last transaction forming an item in the account, and although there had been no acknowledgment, or part-payment, to take the case out of the statute. (b) And notwithstanding the words of the statute of James, "All actions of account.....shall be commenced and sued," &c., it was held \*that even as between ordinary per- 966\* sons, the statute did not begin to run so long as the account was continued (c); and that the statute did not, in any case, apply to an unsettled, open, mutual account, with items on both sides representing cross demands. (d) The law in this respect was modified by Lord Tenterden's act (e), the effect of which is, Application of statute to current accounts. that, although there may be a mutual open running account the mere existence of items not barred, is not sufficient, in actions of debt or assumpsit, to take earlier items out of the statute of limitations. (f) Lord Tenterden's act, however, did not apply to merchant's accounts as to which there was no statutory bar; but now merchants' accounts are on the same footing as other accounts. Consequently, partnership accounts, whether they are or are not merchants' accounts, are now within the statutes of limitations; and those statutes are a bar to an action for an account extending to a period more remote than six years before the commencement of the action, unless there has been a breach of an express trust, or fraud, or payment, or an acknowledgment, such as required by Lord Tenterden's act, or unless the partnership articles are under seal. So long, indeed, as a partnership is subsisting, and

(b) *Robinson v. Alexander*, 8 Eli. N. S. 352, and 2 Cl. & Fin. 717, settled this point, and finally overruled a number of earlier cases.

(c) See *per* Lord Eldon in *Foster v. Hodgson*, 19 Ves. 185; *Scudemore v. White*, 1 Vern. 456.

(d) See the notes to *Webber v. Tivill*, 2 Wms. Saund. 126 *et seq.*, and *Catling*

*v. Skoulding*, 6 T. R. 189.

(e) 9 Geo. 4, c. 14.

(f) *Williams v. Griffiths*, 2 Cr. M. & R. 45; *Cottam v. Partridge*, 4 Man. & Gr. 271; *Ashby v. James*, 12 M. & W. 542; *Clark v. Alexander*, 8 Scott, N. R. 147; *Inglis v. Haigh*, 8 M. & W. 780. See, too, *Jackson v. Ogg*, Johns. 397.

each partner is exercising his rights and enjoying his own property, the statute has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run. (g) This has been decided by the House of Lords in *Knox v.*

*Knox v. Gye.* *Gye* (h), in which a surviving partner relied on the statute as a defense to a suit for an account instituted

\*967 by the executor of a deceased partner. \*The deceased partner had died more than six years before the filing of the bill, and the right of his executor had never been recognized; the surviving partner, however, had continued the partnership business, and had got in outstanding assets within six years. The V.-C. Wood held that the statute was not a bar to the suit; but the decision was reversed by Lord Chelmsford on appeal, and the House of Lords affirmed Lord Chelmsford's decision.

With reference to acknowledgments, it was held in a partnership case, where no account had been come to for six years, Effect of acknowledgment. that a signed acknowledgment of a liability to account in respect of matters more than six years old, was sufficient to justify a decree for an account in respect of them, although the acknowledgment did not contain an admission that anything was due nor any express promise to pay what might be found due on taking the account. (i)<sup>1</sup>

Where a partnership account is agreed to be taken, and a receiver is appointed, a payment<sup>2</sup> made by the receiver to one of the partners on account of a debt owing to him by Payment by receiver in a suit.

(g) See some remarks as to the effects of the statute between partners in *Winter v. Innes*, 4 M. & Cr. 111, and *Way v. Bassett*, 5 Ha. 68.

(h) L. R. 5 H. L. 656. See 19 & 20 Vict. c. 97, § 9. *Miller v. Miller*, 8 Eq. 499, is hardly consistent with this, unless it be upon the ground that there was no dissolution.

(i) See *Prance v. Sympson*, Kay, 678. The expression was, "you and I must go into it and settle the account." See, also, *Skeet v. Lindsay*, 2 Ex. D. 314. Compare *Mitchell's claim*, 6 Ch. 822.

<sup>1</sup> R. and J., brothers, were in partnership. R. having died, J. frequently acknowledged his liability to account to

R.'s estate, agreed to two amicable references, etc.: *Held*, that this was a continuing admission of liability to account so as to suspend the running of the statute of limitations. *Shelmire's Appeal*, 70 Pa. St. 281.

<sup>2</sup> As to a payment on account not constituting a settlement of accounts, see *McKelvy's Appeal*, 72 Pa. St. 409.

Payment of the deceased partner's share of damages recovered in a suit for the destruction of the partnership property, is not such a payment upon the general account of the partnership business as will remove the bar of the statute of limitations. *McKeown v. Guild*, 12 Chicago Legal News, 18.

another partner, is not sufficient to prevent the statute from being a bar to such debt. (*k*)

3. *Account stated*.—To an action for an account of partnership dealings and transactions, an account thereof already stated between the parties (*l*) affords a good defense. (*m*)<sup>3</sup>

3. Account stated.

(*k*) *Whitley v. Lowe*, 25 Beav. 421, and 2 DeG. & J. 704.

(*l*) Of course the maxim, *Res inter alios*, etc., applies to settled accounts, *Carmichael v. Carmichael*, 2 Ph. 101.

(*m*) *Taylor v. Shaw*, 2 Sim. & Stu. 12; *Endo v. Caleham*, You. 306. An account settled by a majority was held binding on the minority in *Robinson v. Thompson*, 1 Vern. 465. See, too, *Stupart v. Arrowsmith*, 3 Sm. & G. 176, and *Kent v. Jackson*, 2 DeG. M. & G. 49.

<sup>3</sup> *Wells v. Erstein*, 24 La. Ann. 317; *Kidder v. McIlhenny*, 81 N. C. 123; *Wagner v. Wagner*, 50 Cal. 76; *Cayton v. Walker*, 10 id. 450; *Silver v. St. L. Iron Mt. & T. R'y. Co.* 5 Mo. App. 381; *Gage v. Parmalee*, 87 Ill. 329; *Hanks v. Baber*, 53 id. 292. See, also, *Wood v. Fox*, 1 A. K. Marsh. 451, and the cases cited below.

In a suit for a dissolution, however, an answer that on a day certain the partners accounted, and have made no new contracts since, does not make it improper for the court to order an account, without first determining the truth of the answer. *Kennedy v. Shilton*, 1 Hilt. 546.

Where there has been a partial settlement of a partnership account, and there is no valid objection to the settlement, it is conclusive upon the parties to it as far as it goes, and leaves open only the unsettled portion of the account. *Foster v. Rison*, 17 Gratt. 321; *Parkhurst v. Muir*, 7 N. J. Eq. 555.

Where the jury find that a note in suit was given in settlement of the final balance due on partnership transactions, all inquiry into the articles of co-part-

nership is immaterial. *Kidder v. McIlhenny*, *supra*.

Where, however, there has been a dissolution and a final settlement, and a note given for the balance ascertained to be due, with the stipulation that the errors and omissions in the settlement may be deducted as payments on the note, a court of law, in an action on the note, may allow such errors and omissions as a defense to the action. *Frink v. Ryan*, 3 Scam. 322.

So, a settlement between two partners, whereby one buys the other's interest in the partnership property, and gives his note for the amount found to be due the retiring partner, does not estop the maker of the note from pleading and showing, when sued on the note, that it was given for too much, by mistake arising out of an erroneous charge against the maker of the note in the settlement. The fact that the maker received the note after discovery of the mistake by him, and while it was a matter of dispute, still insisting that it existed, does not vary the rule. *Hertz v. Clark*, 46 Ga. 649.

Two partners agreed that the partnership should be dissolved, and the business closed, and that the partnership accounts should be considered and taken as if the partnership had never existed, and that the amount already received by one partner from the partnership should be his compensation paid by the other partner to him as an employe, and that the other partner should collect the debts due the firm, and pay the debts due by the firm; and the agreement was acted on: *Held*, that the partner who received the

No precise form is necessary to constitute a stated and settled account; but an account stated, unless it be in writing, is no defense

compensation as an employe had no further interest in the partnership accounts, and could not maintain a suit for an accounting. *Wagner v. Wagner, supra.*

Where the petition in a suit between partners was for a balance stated upon an accounting, and the answer, after setting up the statute of limitations, admitted the partnership, its dissolution, and a large partnership account, denying the striking of a balance by the parties, but claimed a balance in the defendant's favor, and prayed for an accounting and judgment; and where both parties, in open court, assented to an order made for taking an account before a referee, which was taken: *Held*, that, by assenting to the taking of the account, plaintiff abandoned his claim to recover as upon an account stated, and defendant waived any bar to the claim of plaintiff, and the action became an equitable one for a final accounting, between former partners. *Auld v. Butcher*, 2 Kan. 135.

A and B formed a partnership, agreeing, by an indenture, that A should put in \$20,000, that B should transact the firm's business, that the profits should be divided in the proportion of 17 to 7, and that A might draw out \$2500, and B \$300 annually. The partnership was dissolved, and the goods divided; and it was then agreed that A should estimate the profits, and B should elect whether to buy A's interest, or sell his own, according to that estimate. A estimated the profits at \$25,500, and B elected to take the effects, and pay A his share of the profits. A memorandum was also made by A and B of certain items which were to be left to arbitrators. A brought a bill to obtain an account from B: *Held*, that the agreement, after dissolution, was

not void for uncertainty, because of its silence as to interest on the amounts withdrawn by the partners, nor because the disputed items were excluded from it. *Miller v. Lord*, 11 Pick. 11.

Where several persons entered into a co-partnership to trade in plank and lumber, and some years after made a settlement, in which the parties mutually signed a paper purporting to be "a settlement of their plank and lumber account:" *Held*, that the presumption that such settlement was a dissolution of the partnership was not repelled by a recital in the memorandum that the parties were to be entitled to certain proportions of the profits, when ascertained; but that it rather imported a final settlement of the business, and postponed a division of the profits until the uncollected balances were made available, and that a party pleading such settlement was estopped from opening it. *Ferguson v. Hite*, 9 Dana, 553.

Where it appeared that, during a co-partnership of eight years duration, there had been occasional calculations of interest, and summing up of results, and a division of profits, but no surrender of vouchers, or cancellation of books, nor release, nor receipt in full: *Held*, that the transactions were not of such a conclusive nature as to bar an account. *Lynch v. Bitting*, 6 Jones, Eq. 238.

A settlement made by a surviving partner, under the provisions of the first article of the administration act of 1845 (Rev. Code 1845, 70,) is evidence in favor of the representative of the deceased partner against the survivor, as an admission. *State v. Baldwin*, 31 Mo. 561.

In a settlement between two partners, it was agreed that "S. is due L. \$295.86

to an action for a further account. It is not, however, necessary that the account should be signed by the parties,<sup>4</sup> if it can be

to make him equal with the said L. in the outlays:" *Held*, that the true construction is that S. owes to L. (not to the firm) the said sum. *Little v. Stanton*, 32 Pa. St. 299.

On the dissolution of a partnership between A and B, B was to retain the goods of the firm and A was to have all the lands and all the debts due the firm, and pay all the debts due from them, and by a clause added at the suggestion of A at the close of the articles of dissolution, they were to operate as a receipt for all demands then existing between A and B, as exhibited by the books of the firm, with a few exceptions specified: *Held*, that A thereby approved and ratified a payment by B of an individual debt, the entry of which was made upon the books, and which entry the clerk testified he had shown to A, who said "that it was of no account and would make no difference." *Brewster v. Mott*, 4 Scam. 378.

On the dissolution of a firm, without taking an account, it was agreed between them that one should take a certain amount of the effects and the other the residue, and "pay all the debts due from the firm." The former had before advanced to the firm, and taken his partner's memorandum for the same: *Held*, that by the settlement he was precluded from claiming such memorandum as a "debt due from the firm." *Patterson v. Martin*, 6 Ired. L. 111.

Where an account of the mutual dealings of two firms, of both of which A was a member, had been stated, and all the partners of the creditor firm, save A, who refused to join as plaintiff and was made defendant, brought an action against the debtor firm: *Held*, that the plaintiffs were entitled to judgment for the balance on the account stated, and that, facts appearing that would render

a recovery without adjusting the accounts of the individual member inequitable, such adjustment would be directed by the court. *Cole v. Reynolds*, 18 N. Y. 74.

On the dissolution of a co-partnership between S. and P., it was agreed that S. should settle the partnership concerns; and the agreement between them in writing contained the clause, "that the accounts of the partners shall be made equal by the said S., selecting and taking to his own account, from the assets or effects of the firm, an amount sufficient to equalize the accounts of said partners with interest:" *Held*, that this clause did not release P. from liability for loss to the partnership, nor from his liability to pay to S. the amount which might be due him after settling the concern; and that it did not show an intention that S. should apply doubtful or uncollectable debts due the firm in payment of the amount due him, at their nominal value. *Sayre v. Peck*, 1 Barb. 464.

A sale by one partner of his interest in the business to a third party, followed by his purchase of his former partner's interest at a fixed price, is presumptive evidence that all the former accounts were settled, or at least merged in the new agreement. *Norman v. Hudleston*, 64 Ill. 11.

<sup>4</sup>See *Jessup v. Cook*, 6 N. J. L. 434.

Where, in an action for a partnership settlement, under the plea of a settlement made and release granted, defendant produces and relies on a private instrument written and signed by plaintiff alone, in which the latter, after mentioning various partnership transactions, declares that the partnership has been fully settled, and grants full acquittance thereof to defendant, but the document stands alone without ex-

\*968 be shown to have been acquiesced in by them (*n*)<sup>\*</sup> and \*an account may be stated and settled, although a few doubtful items are omitted. (*o*) It is to be observed, that 'the fact that an account has already been *rendered* by the defendant to the plaintiff does not deprive the latter of his right to have the same account taken under the direction of a court (*p*); to have that effect an account must not only have been sent in to the plaintiff, but also have been acquiesced in by him. (*q*) It is further to be observed, that although the principle on which accounts have been kept may have been acquiesced in, the items may not. (*r*)

Accounts of companies laid before the shareholders at a general meeting, and approved and adopted by them, cannot be impeached by absent or dissentient shareholders, except upon the ground of proved error or of fraud. (*s*)

A stated account may be impeached either wholly or in part on the ground of fraud or mistake.<sup>1</sup> If there be fraud, or if any mistake affects the whole account, the whole will be opened, and a new account will be directed to be

planation or corroboration, and the other evidence is conclusive that no settlement had been made, the instrument will have the same effect to establish plaintiff's partnership interest as if written by defendant himself; and a verdict for plaintiff will be sustained. *Denton v. Erwin*, 6 La. Ann. 317.

(*u*) See *Hunter v. Belcher*, 2 DeG. J. & Sm. 194; *Morris v. Harrison*, Colles, 157; *Willis v. Jernigan*, 2 Atk. 252. See on this defense in general, *Beames' Pleas in Equity*, 222, and *Mitford*, 302, edit. 5. A verbal account and a receipt in full is not equivalent to a stated account, *Walker v. Consett*, *Forrest*, 157.

<sup>5</sup>To constitute a settlement of accounts between partners, all must consent and be bound by it, or none can be bound. *Lamalere v. Caze*, 1 Wash. 435. *Cooper v. Frederick*, 4 G. Greene, 403.

(*o*) *Sim v. Sim*, 11 Ir. Ch. 310.

(*p*) See *Clements v. Bowes*, 1 Drew. 692.

(*q*) *Irvine v. Young*, 1 Sim. & Stu. 333.

(*r*) See *Mosse v. Salt*, 32 Beav. 269; *Clancarty v. Latouche*, 1 Ball & Beatty, 420. Compare *Hunter v. Belcher*, 2 DeG. J. & Sm. 194.

(*s*) See *Holmes' case*, 2 DeG. M. & G. 113; *Stupart v. Arrowsmith*, 3 Sm. & G. 176; *Kent v. Jackson*, 2 DeG. M. & G. 49; *Ex parte Bignold*, 22 Beav. 143. But as to reports without any accounts, see *Portsmouth Banking Co.* 2 Eq. 167.

<sup>1</sup> See *Abrahams v. Hunt*, 26 Pa. St. 49; *Silver v. St. L. Iron Mt. & S. R'w'y. Co.* 5 Mo. App. 381; *Gage v. Parmalee*, 87 Ill. 329.

A deed of final settlement between partners will not, however, be disturbed, except for the most cogent reasons. *Murray v. Elston*, 24 N. J. Eq. 310.

Although a partner at and before the time of making a settlement of the partnership account, and selling his interest to his co-partner may have been under great financial embarrassment and under indictment as an officer for embezzlement, yet if he is a free agent and has ample time to deliberate, and pro-

taken, without reference to that which has been stated (t); but if there be no fraud, and if no mistake affecting the whole account can

cures a competent accountant to examine the books of the firm, who makes a faithful examination, and submits the same, and the party objects as to certain matters, showing that he understands the business; and the proof also shows that he was familiar with it, and he finally makes a lumping trade, settling the business and disposing of his interest, and sometime after ratifies the act by asking time to pay a balance, a court of equity will not set aside the transaction, even though the co-partner pressed him for a dissolution and settlement. *Gage v. Parmalee, supra*.

Where the active and managing partner was by the articles of co-partnership allowed a salary of \$1,000 a year for his services, and afterwards one partner sold out his interest and retired, and no new agreement was entered into, and, as the business increased, the active partner charged on the books from time to time an increase in his salary, to which no objection was made by the other partner, although he often examined the books and had monthly statements furnished him. It was *held*, that after dissolution and settlement, on the basis of the increased salary, this was no ground for setting the settlement aside. 87 Ill. 329, *supra*. See, also, *Brewster v. Mott*, 4 Scam. 378.

A settlement of partnership accounts between parties, dealing with each other at arm's length, will not be opened in equity, merely on the ground of the impaired health and depression of spirits of one of the parties at the time, no unsoundness of mind being proved. *Billingslea v. Ware*, 32 Ala. 415.

One partner, when sued by the other, on a note executed by the former to the latter in settlement of a general balance on a dissolution of their partnership, may impeach its validity for fraud, without resorting to a direct action to annul the settlement. *Powell v. Graves*, 9 La. Ann. 435.

Where a partner, by concealing the profitable results of his outside speculations and rendering a false balance sheet, obtained from his co-partner a bill of sale of all of the latter's interest in the firm: *Held*, that equity would apply the rule making partners each other's agent and trustees, and would grant appropriate relief, under a prayer for a re-opening of the settlement and for general relief. The complainant was only bound to ordinary vigilance to prevent the accomplishment of the fraud. *Pomeroy v. Benton*, 57 Mo. 531.

In re-opening a settlement between partners alleged to have been procured by the fraud or mistake of the managing partner trusted as such, equity will allow more latitude than where no confidence is reposed. *Merriwether v. Hardeman*, 51 Tex. 436.

Where a judgment is recovered at law by one partner against another in respect of the partnership dealings, the defendant may still file a bill for an account, and if, upon a statement thereof it appears that he owes the defendant nothing, the Court may properly enjoin the collection of so much of such judgment as is shown to be inequitable and unjust. *Gregg v. Brower*, 67 Ill. 526.

In the case of a mistake in the settlement of a partnership account, where both parties had equal opportunities of

(t) As in *Clarke v. Tipping*, 9 Beav. 284; *Wharton v. May*, 5 Ves. 68; *Beaumont v. Boulbbee*, *ib.* 435, and 7 Ves.

599; *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Coleman v. Mellersh*, 2 *ib.* 309.

be shown, but the correctness of some of the items in it is, nevertheless disputed, the account already stated will not be treated as non-existing, but will be acted upon as correct, save so far as the party dissatisfied with any item can show it to be erroneous (*u*). In a case of fraud, an account will be opened *in toto*, even after the \*969 lapse of a considerable time (*x*); but if no \*fraud be proved, an account which has been long settled will not be re-opened *in toto*; the utmost which the Court will then do will be to give leave to surcharge and falsify (*y*); and there are cases in which, in consequence of lapse of time, the Court will do no more than itself rectify particular items, instead of giving leave to surcharge or

knowing the mistake, and there has been no fraud or concealment, equity will not correct the mistake. *Belt v. Mehen*, 2 Cal. 159. See, however, *Hertz v. Clark*, *ante*, p. 967, note.

A court of equity may correct errors in the settlement of partnership affairs when they arise from misrepresentations innocently made by one or more members of the firm. *Stephens v. Orman*, 10 Fla. 9.

N. and J. entered into an agreement to dissolve partnership in December, 1861. By the terms of the agreement, the books were to be balanced, excluding all doubtful debts, and the amount due N. ascertained, and J., with others, was to purchase his interest and continue the business. The cash balance against N. was found to be \$1,800, by one of the new firm who had charge of the books; the suspended debts amounting to a much larger sum than was expected. This was not disclosed to the complainant, but he was allowed to execute the contract under the belief that there would be a balance in his favor. N. was to share in the suspended debts as fast as they were collected. N. entered the service of the new firm, and continued till April, 1861. In October, 1862, he filed his bill to set aside his agreement and be reinstated in the firm: *Held*, this was not such a mistake as would entitle the complainant to

relief in equity. *Nicholson v. Janeway*, 16 N. J. Eq. 285.

Plaintiff proposed to purchase the interests of his co-partners in a firm business; the book-keeper made out a statement of accounts in which the private accounts of the partners were included as assets. The agent acting for the other partners refused to sell upon that basis, but made a statement in which the private accounts were set down as profits, and offered to sell with that statement as a basis. Plaintiff, with full knowledge of the difference in the statements, accepted the proposition, and the sale was completed. Plaintiff gave notes which he subsequently paid as they became due, and never offered to return the property. In an action for an accounting: *Held*, that these facts authorized a finding that there was no material mistake of fact, and that plaintiff was entitled to no equitable relief. *Stitthheimer v. Killip*, 75 N. Y. 282.

(*u*) *Pitt v. Cholmondeley*, 2 Ves. S. 565; *Vernon v. Vawdry*, 2 Atk. 119.

(*x*) *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Stainton v. the Carron Co.* 24 Beav. 346. See *Vernon v. Vawdry*, 2 Atk. 119; *Beaumont v. Boulbee*, 5 Ves. 485.

(*y*) See *Millar v. Craig*, 6 Beav. 433; *Brownell v. Brownell*, 2 Bro. C. C. 61, and 1 Mac. & G. 94.

falsify generally. (z)<sup>1</sup> Moreover, the mere fact that items are treated in an improper way, or are improperly omitted, is not of itself sufficient to induce the Court to open a settled account; for if the items in question were known to the parties, and there be no fraud or undue influence proved, the Court will infer that the partners agreed to treat the items as they in fact did treat them. (a) But an item omitted by mutual mistake will be set right. (b)

If a settled account is impeached for errors, particular errors must be stated and proved (c); and the same rule holds where the account is settled, "errors excepted." (d)

In surcharging and falsifying, errors of law, as well as errors of fact, may be set right (e); and where leave is given to one party to surcharge and falsify, similar leave is <sup>Mistakes of law.</sup> thereby also accorded to his opponent. (f)

On the retirement or death of a partner, it is usual for an account to be stated between him or his representatives <sup>Accounts stated on the death of a partner.</sup> on the one hand, and the continuing partners on the other, and for mutual releases to be given. Afterwards attempts are occasionally made to open the accounts thus stated, and to set aside the releases, and to have a new account taken, and a fresh settlement of the partnership affairs. In such cases as these, before the settled accounts can be opened, the release \*must \*970 be set aside. (g) Whether this can be done or not, depends upon circumstances which will be found discussed under the title rescission of contract. (h)

In taking accounts under an ordinary decree, settled accounts are never disturbed unless specially directed so to be. (i)

(z) See *Twogood v. Swanston*, 6 Ves. 485; *Maund v. Allies*, 5 Jur. 860.

<sup>1</sup>A settlement between partners, which does not appear to have been unfair, will not be disturbed at the instance of one who has not within a reasonable time repudiated its terms nor taken any steps to rescind it. *McGunn v. Hamlin*, 29 Mich. 476.

(a) See *Maund v. Allies*, 5 Jur. 860, L. C.; *Laing v. Campbell*, 36 Beav. 3, where bad debts were treated as good.

(b) *Pritt v. Clay*, 6 Beav. 503.

(c) *Parkinson v. Hanbury* L. R. 2 H. L. 1; *Dawson v. Dawson*, 1 Atk. 1; *Taylor v.*

*Haylin*, 2 Bro. C. C. 310; *Kinsman v. Barker*, 14 Ves. 579.

(d) *Johnston v. Curtis*, 2 Bro. C. C. 311, note.

(e) *Roberts v. Cuffin*, 2 Atk. 112.

(f) 1 Madd. Ch. 144, where it is said to have been so held by V.-C. Leach in *Anon*, 6 March, 1821.

(g) See *Millar v. Craig*, 6 Beav. 433; *Fowler v. Wyatt*, 24 Beav. 232, and see *Parker v. Bloxham*, 20 Beav. 295.

(h) *Ante*, p. 927 *et seq.*

(i) *Newen v. Wetten*, 31 Beav. 315. But see *Milford v. Milford*, MacCl. & Y. 150.

4. *Award*.—Another defense to an action for an account is, that the matters in difference between the partners have been disposed of by arbitration.

A mere agreement that the matters in question should be referred, has frequently been held to be no defense to an action in respect of them. (*k*)<sup>1</sup> But if those matters have actually been disposed of by the award of an arbitrator, they cannot afterwards be made the foundation of any action between the parties on whom the award is binding. (*l*) But an award will not avail as a defense to the action if the account sought by it is different from that to which the award applies. (*m*) So an award on a reference of all matters in difference is no defense to an action for an account of moneys received after the making of the award, and not dealt with by it, owing to a mistake on the part of the arbitrator. Thus in *Spencer v. Spencer* (*n*), the partners on a dissolution referred all matters in difference to arbitration. The arbitrator awarded that one of the partners should get in the outstanding debts, which were estimated by the arbitrator at a certain amount. The award was acted on, but it appeared that the debts ultimately got in amounted to more than the sum at which they had been estimated. One of the partners claimed a share of the difference between the estimated and the actual amount of these debts, and as it was plain that the award had proceeded on a mistake, an account was directed, notwithstanding all matters in difference had been referred.

\*971 \*With respect to agreements to refer, an important enactment is contained in the Common law procedure act, 1854, § 11, as has been already pointed out. (*o*)

5. *Payment, and accord and satisfaction*.—Payment, *per se*, is not a defense to an action for an account; for the subject of such an action is to ascertain how much is or was payable. But payment of a sum of money and acceptance of it in lieu of all demands, is equivalent to accord and satisfaction,

(*k*) *Thompson v. Charnock*, 8 T. R. 139; *Michell v. Harris*, 4 Bro. C. C. 312. See *ante*, p. 868.

<sup>1</sup> *Page v. Marshall*, 6 Phila. 264.

Partners are not precluded from making a partial settlement by arbitration, because the partnership concerns are not in a state to be finally settled. *Kendrick*

*v. Tarbell*, 26 Vt. 416.

(*l*) *Tittenden v. Peat*, 3 Atk. 529; *Routh v. Peach*, 2 Anst. 519, and 3 ib. 637.

(*m*) As in *Farrington v. Chute*, 1 Vern. 72.

(*n*) 2 Y. & J. 249.

(*o*) *Ante*, p. 868.

which is as much a defense to an action for an account as is a release. (*p*)

With respect to accord and satisfaction, it is to be observed that there must be no uncertainty in the agreement relied on as an answer to the action for an account, and that it must be shown that such agreement has been performed; for in the performance lies the satisfaction. (*q*) On these grounds the late Vice-Chancellor Wigram, in a suit for an account by the executors of a deceased partner against the surviving partner, overruled a plea that it was agreed between the defendant and the deceased that all accounts between them, and all claims of the deceased in respect of the partnership, should be waived; and that in consideration thereof the deceased should be permitted to carry on the business alone, without any further question or dispute by the defendant, which the deceased accordingly did. (*r*) However, if an agreement to waive all accounts is entered into, and is founded on a sufficient consideration, and is free from all taint or fraud and undue influence, the parties to it will be precluded from suing each other in respect of the accounts so agreed to be waived. (*s*)

6. *Release*.—A release is a good defense to an action for an account. (*t*) But where the release has been executed on the faith of the correctness of certain accounts, which are afterwards ascertained to be incorrect, the release will be set aside, and a fresh account will be decreed (*u*), unless the parties clearly \*intended to abide by the accounts, whether correct or not. A release, moreover, can, of course, be set aside for fraud. A release, to be effectual as such, must be under seal. A release not under seal is regarded as a stated account. (*x*)

(*p*) See Bac. Ab. Accompt E.; Vin. Ab. Account N.; *Brown v. Perkins*, 1 Ha. 564. But see Com. Dig. Accompt E. 6, pl. 8.

(*q*) Com. Dig. Accord (B. 3) and (B. 4).

(*r*) *Brown v. Perkins*, 1 Ha. 564.

(*s*) See *Sewell v. Bridge*, 1 Ves. Sen. 297. Compare the last case.

(*t*) See Mitford, Pl. 304, ed. 5. As to form of plea, see *Brooks v. Sutton*, 5

Eq. 361.

(*u*) See, for example, *Pritt v. Clay*, 6 Beav. 503; *Wedderburn v. Wedderburn*, 2 Keen, 722, and 4 M. & Cr. 41; *Millar v. Craig*, 6 Beav. 433, and see *Phelps v. Sproule*, 1 M. & K. 231, and see *ante*, account stated, p. 967.

(*x*) Mitf. Pl. 307, ed. 5. See, as to agreements to waive accounts, *ante*, notes (*r*) and (*s*).

*(c.) Of the decree for a partnership account.*

A decree for a partnership account in its simplest form is to this effect: "Let an account be taken of the partnership dealings and transactions between the plaintiff and the defendant from ——. And let what upon taking the said account shall be certified to be due from either of the said parties to the other of them, be paid by the party from whom to the party to whom the same shall be certified to be due.<sup>1</sup> Liberty to apply." (y)

Decrees for  
account.

<sup>1</sup> A decree giving to an alleged partner a share in the avails of property purchased with partnership funds cannot be sustained, when there is no account taken between the partners, nor any proof of the state of accounts between them. *Bowman v. O'Reilly*, 31 Miss. 261.

But payment of a dividend of profits may be decreed before the final distribution of the assets, where such dividend was to be made at stated periods. *O'Conner v. Stark*, 2 Cal. 153.

In a bill for an account filed by one partner against his co-partners, after the termination of the partnership, all the partners, as well defendant as complainant, are regarded as actors, and the ac-

counts must be stated by the auditor, and the concerns of the partnership and rights of the several partners finally adjudicated upon by the court, as if each partner was a complainant filing a bill against his co-partners. *Grove v. Fresh*, 9 Gill & J. 280; *Raymond v. Caine*, 45 N. H. 201; *Pratt v. McHatton*, 11 La. Ann. 260.

In an action brought by one partner against his co-partner for an accounting, in which the answer while admitting the partnership denies the terms as alleged in the petition, and as a second defense claims damages for certain breaches by the plaintiff of the partnership contract, it is not error for the court to submit to one jury the question of the

(y) Seton on decrees, 543, ed. 3, where several other useful forms will be found given and referred to. The reports of the following cases also contain useful precedents:—*Devaynes v. Noble*, 1 Mer. 530, account where one firm succeeded another; *Wedderburn v. Wedderburn*, 2 Keen, 752, account where one firm succeeded another, and the capital of a deceased partner was continued in trade; *Cook v. Collingridge*, Jac. 623, and more fully in 27 Beav. 456, *note*. sale of a testator's share set aside and account of subsequent profits and good-will; *Crawshay v. Collins*, 15 Ves. 230, and 2 Russ. 347, account of subsequent profits; *Millar v. Craig*, 6 Beav. 442, setting aside a

release and opening accounts; *Fereday v. Wightwick*, Tambl. 262, declaration that property acquired by one partner was partnership property, and an account accordingly; *Wilson v. Greenwood*, 1 Swanst. 483, sale, receiver, and account; *Blisset v. Daniel*, 10 Ha. 538, decree restoring a partner wrongfully expelled; *England v. Curling*, 8 Beav. 140, specific performance of agreement for a partnership; *Pillans v. Harkness*, Colles, 442, decree relieving a person who had been induced to become a partner by fraudulent representations; *Evans v. Coventry*, 8 DeG. M. & G. 835, winding up insurance society, account against directors for breach of trust.

In actions for an account of partnership dealings and transactions, the ordinary rule is to give no costs up to the decree directing the account; nor will this rule be de- Costs.

terms and duration of the partnership, then to refer to a referee to state and report the account between the partners, and finally to submit to a second jury the claims for damages. *Carlin v. Donagan*, 15 Kan. 495.

A decree in the settlement of a partnership should settle the whole matter, and the report of a master is defective where it does not state the account between each of the members of the firm, as well as between the plaintiff and the others. *Eaton's Appeal*, 66 Pa. St. 483. See, also, *Felder v. Wall*, 26 Miss. 595; *Raymond v. Caine*, *supra*; *Griggs v. Clark*, 23 Cal. 427; *Warren v. Wheelock*, 21 Vt. 323; *Scott v. Lalor*, 18 N. J. Eq. 301; *McRae v. McKenzie*, 2 Dev. & Bat. Eq. 232; *Anderson v. Beebe*, 22 Kan. 768.

In a suit in equity between partners for a settlement, no final decree can be made while debts due from the firm remain unadjusted, unless the plaintiffs will deduct the amount of such debts from the sum which they seek to recover. *Tyng v. Thayer*, 8 Allen, 391; *Brinley v. Kupfer*, 6 Pick. 179.

Where, however, a court of equity has made a final decree, dissolving a partnership, and applying its effects to the payment of its debts, without judicially ascertaining the joint liabilities which the receiver is directed to pay, proceedings may be taken with proper notice to the respondents, to ascertain the joint debts of the firm. *Hubbard v. Curtis*, 8 Iowa, 1.

If on the dissolution of a partnership, certain partners receive more than their share of the assets, the exact amount so received by each partner should be ascertained, and judgment entered accordingly, in an action by a partner who has been wronged in the distribu-

tion against his former co-partners. A joint judgment in such a case is erroneous. *Rhiner v. Sweet*, 2 Lans. 386.

In a suit against co-partners for a share of past profits, the verdict should be against those only who have received more than their proportion, unless some reason appears why the others should refund or contribute. *Wadley v. Jones*, 55 Ga. 329.

In a suit by one partner against another for the settlement of a partnership and partnership accounts, after dissolution, where it appears that a large amount of the partnership debts and liabilities are unpaid, and for some of which there are judgments against the partners, and that one of the partners has collected more of the partnership funds than the other, ordinarily it is error for the Court to decree personally for the money so collected, or any part thereof, in favor of one partner against the other, until the payment of the partnership debts are first provided for. *Carper v. Hawkins*, 8 W. Va. 291.

The report of a referee, stating a partnership account, showed that the interest of the plaintiff in the firm exceeded that of the defendant by a certain sum: *Held*, that it was error to enter judgment for the plaintiff in that amount, but that a sale of the entire partnership property should have been ordered, with directions to pay the costs of court out of the proceeds; then to pay to the plaintiff the amount due him; and, lastly, to divide the residue equally between the parties. *Lannan v. Clavin*, 3 Kan. 17.

Upon a bill by a partner against his partner's administrators and heirs, claiming a moiety of profits from the sale of certain lands, and an undivided half of lands unsold, a decree setting

parted from except in cases of gross misconduct on the part of the

apart to the complainant a certain portion of the land in severalty erroneous. *St. Clair v. Smith*, 3 Ohio, 355, see *post*. 1015.

Where partnership articles provide that one of the partners is to bear all losses arising from sales to irresponsible parties, it is improper, on a bill for an account, to render a decree against him personally for such sums as he has been restrained by injunction from collecting, and perhaps may never collect. But a colorable sale on credit in fraud of the other partners' rights should, in stating the account, be considered as a sale for cash. *Maier v. Bull*, 44 Ill. 97.

Upon a bill by a partner for an account of the partnership, if a balance is reported against him, the defendant may have a decree therefor upon the plaintiff's bill. *Scott v. Pinkerton*, 3 Edw. Ch. 70.

The decree of a court of equity, on a bill charging a violation of a partnership agreement, may fix upon a previous time, at which the partnership shall be considered as having determined as between the parties. *Durbin v. Barber*, 14 Ohio, 311.

A decree recognizing plaintiffs' right to an interest in a partnership between their ancestor and defendant who was ordered to account, authorized the former to exercise all their rights as partners to protect and manage that interest, but, without passing upon, left the mode of exercising those rights to the necessity of the case and the interpretation given the partnership contract: *Held*, that plaintiffs were not entitled to a writ giving them the unreserved possession and administration of the partnership property. *Junek v. Hezeau*, 11 La. Ann. 731.

An assignee of one co-partner's share in the property and assets of the firm is liable, even without notice, to all the

equities of his assignor growing out of the co-partnership; but a decree against the assignee on account of such equities is a decree *in rem*, it operating upon the property assigned, and a *fi. fa.* cannot be issued upon it against the assignee. *Hunt v. Smith*, 3 Rich. Eq. 465.

A reference, upon agreement of parties, to a master to take an account of all the assets of a co-partnership except the W. oil works, "as the same stood on and up to" the day of the dissolution, excludes the property appertaining to the W. oil works at the date of the dissolution, and not that appertaining to them at the time of their conveyance to the partnership, as, for instance, two boats included in the deed thereof. *Bliffins v. Wilson*, 113 Mass. 248.

A bill by a partner filed before the end of the term the partnership was to run, alleged violations of the partnership contract, and asked for the dissolution of the partnership, and that an account be taken. During the pendency of the suit the term of the partnership expired. A supplemental bill was filed by leave, stating this fact and charging a misappropriation of the partnership assets by the defendant, and asking for an accounting between the partners. Answers to both bills and replications thereto were filed, and proofs were taken and the cause referred to a master, who made a report showing there was due to the complainant from one of the other partners several thousand dollars, and considerable amounts due the firm. The court, on a hearing, and without any objection to the report, dismissed the bills: *Held*, that complainant was entitled to a decree settling the accounts and providing for disposition of firm effects, and that court erred in dismissing the bills. *Curyea v. Beveridge*, 94 Ill. 425.

\*defendants. (z) But where the action is really instituted to try some disputed right, the unsuccessful litigant will be ordered to pay the costs up to the trial of the action. (a)<sup>1</sup> The costs of taking the accounts directed at the hearing are usually defrayed out of the partnership assets, and, if necessary, by a contribution between the partners. (b)

The method of taking a partnership account under such a decree is as follows :—

1. Ascertain how the firm stands as regards non-partners. Mode of taking the accounts.

2. Ascertain what each partner is entitled to charge in account with his co-partners; remembering, in the words of Lord Hardwicke, that “each is entitled to be allowed as against the other, everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought. (c)

3. Apportion between the partners all profits to be divided or losses to be made good; and ascertain what, if anything, each partner must pay to the others, in order that all cross claims may be settled.<sup>2</sup>

(z) See *Hawkins v. Parsons*, 8 Jur. N. S. 452; *Parsons v. Hayward*, 4 D. G. F. & J. 474.

(a) *Warner v. Smith*, 9 Jur. N. S. 169. See, also, *Norton v. Russell*, 19 Eq. 343, where a surviving partner refused an account to the executor of his deceased co-partner. See, as to mutual companies, *Harvey v. Beckwith*, 10 Jur. N. S. 577.

<sup>1</sup>The question as to which of the parties has, by his conduct, caused the discord between them, is never considered, with a view to an adjustment of the costs of a settlement of their partnership affairs in court. *Stevens v. Yeatman*, 19 Md. 480.

In an action to liquidate a partnership, all are plaintiffs, and all defendants; and where the decree distributes anything between the partners, the costs may be decreed against all, to be borne by them equally. *Pratt v. McHatton*, 11 La. Ann. 260.

(b) This rule was followed as to the whole costs where the action was referred under § 11 of the Com. Law Proc. Act. 1854; *Newton v. Taylor*, 19 Eq. 14.

(c) *West v. Skip*, 1 Ves. S. 242. The rule in *Clayton's case*, respecting the appropriation of payments applies to partners *inter se* as well as to other persons. See *Toulmin v. Copland*, 3 Y. & C. Ex. 625, and 7 Cl. & Fin. 350.

<sup>2</sup>The method of taking partnership accounts, above stated, is substantially followed in whole or in part, in *Neudecker v. Kohlberg*, 3 Daly, 407; *Lusk v. Graham*, 21 La. Ann. 159; *Chambers v. Crook*, 42 Ala. 171; *Collins v. Owens*, 34 Ala. 66; *Gaines v. Coney*, 51 Miss. 323; *Moore v. Wheeler*, 10 W. Va. 35; *Stevens v. Yeatman*, 19 Md. 480; *Schulte v. Anderson*, 13 Jones & Sp. 489. See, also, *Frigerio v. Crottes*, 20 La. Ann. 351; *Phelan v. Hutchinson*, Phill. Eq. 116.

An accounting between co-partners is

In order, therefore, to take a partnership account, it is necessary to distinguish joint estate from separate estate; joint debts from separate debts;<sup>3</sup> and to determine what

Matters involv-  
ed in taking  
the account.

to be governed by the special provisions of the co-partnership agreement; *Neudecker v. Kohlberg*, 3 Daly, 407; *Pearce v. Pearce*, 77 Ill. 284. And the right to return of capital invested by each partner is only to be destroyed by express stipulation to the contrary. Unless waived or extinguished by express agreement, the return of capital or of other means furnished by each party for use and employment in the business for their mutual advantages, although a debt of a secondary character, is, as between them, an obligation of the partnership which should be discharged before any final distribution of the profits. *Neudecker v. Kohlberg supra*.

Thus, where by a co-partnership agreement, R. was to furnish "capital," and M. "skill and knowledge of business," all gain and increase to be equally divided on the termination of the partnership; it was held that, on dissolution, R. was a creditor to the extent of his capital, and M. only entitled to half the gain, if any. *Rowland v. Miller*, 7 Phil. 362.

Partnership accounts should be so stated where one partner has had entire charge of the business, that he will be debited with the whole capital placed in his hands, as well as with the proceeds of sales realized by him. And where part of the capital was composed of stock, which has been used in the business or disposed of, and the proceeds charged against him he should be credited with such stock as a disbursement, to the amount at which it was originally charged against him. *Gunnell v. Bird*, 10 Wall. 304.

Where one partner puts into the firm

simply the use of machinery, and another a patent right, and another advances money to put the business in operation, and agrees to convey land, on bill for an accounting and for a sale of the property, each party should be allowed for all money advanced, a fair and reasonable rent for his property employed, up to the time of filing the bill, and for labor performed by each during that period and the balance struck accordingly. It is error to allow a certain per cent. for the use of machinery. It should be the fair value of its use as situated, and not what it might have been worth if used at some other place. *Flagg v. Stowe*, 85 Ill. 164.

The plaintiff and defendant, being partners in the lumbering business, the former conveyed to the latter the undivided  $\frac{1}{2}$  of a lot of land which he had bought for a trifling sum, at a tax sale, upon an agreement that the defendant should let him have \$800, for one year without interest, and furnish money to carry on the partnership business. From this land the parties as a firm took a large quantity of lumber. In an action for an accounting between the parties, the referee found that the land was worth \$1000, and he credited the plaintiff that amount: *Held*, that the referee erred in giving such credit; the proof showing that the land had cost the plaintiff only a trifle, and that he was willing to put it into the firm upon the terms stated: *Held, also*, that the amount reported by the referee as due from the defendant being \$2023.-22, there should be deducted from that

<sup>3</sup>On the filing of a bill in chancery for the settlement of partnership accounts, the parties cannot introduce their indi-

vidual accounts into the statement. *Hanks v. Baber*, 53 Ill. 292.

gains and what losses are to be placed to the joint account of all the partners, or to the separate accounts of some or one of them exclu-

sum the  $\frac{1}{2}$  of \$1000, the value of the whole land less the interest for one year on \$800, viz: \$56; leaving a balance of \$1579.22, due the plaintiff. *Leonard v. Martin*, 52 Barb. 113.

Where in an action of account between co-partners, the auditors allowed to the defendant the sum of \$2,236.42, which was the full amount of a note advanced by him as a part of the capital of the firm; it was *held*, that such report ought not to be set aside, because the defendant in an action of account previously brought by him against the present plaintiff had alleged that he had advanced as capital to said co-partnership \$2,000, and had not at any time before the hearing, claimed that he had advanced a greater sum. *Day v. Lockwood*, 24 Conn. 185.

A partner who has paid a firm debt is not entitled to subrogation against his co-partner until an account has been settled between them. *Fessler v. Hickernell*, 82 Pa. St. 150.

The complaint in an action to dissolve a partnership, and settle the accounts, averred a loss, borne exclusively by the plaintiff, and asked for judgment for defendant's proportion; and the evidence showed a profit realized by plaintiff in one transaction, as well as a loss borne by him in another: *Held*, that the account taken should credit the defendant with his part of the profits realized, as well as charge him with his proportion of the loss sustained. *Clark v. Gridley*, 41 Cal. 119.

If one partner being indebted to his co-partner, discharges the debt by paying a debt of equal amount due from his co-partner to a third person, but makes the payment with money or property belonging to the partnership, he can only claim, on settlement of the partnership accounts, a credit for one-

half of the amount paid. *Wolff v. Shelton*, 51 Ala. 425.

A, a merchant, being largely indebted took B in as a partner, who brought in no capital, but who succeeded in establishing the credit of the firm, and the partnership business produced immense profits. It was agreed that the debts of A should be undertaken by the firm. The firm failed, and A died. One of the debts of A was \$300,000 to the United States, which was compromised on the payment of \$200,000. The remaining debts of A were paid and compromised by the firm: *Held*, that A became a creditor to the firm to the amount of A's debts paid and compromised by the firm, but only to the amount at which they were compromised, and that as the partnership property, after the payment of the partnership debts, belonged to the partners, B was to be credited with the amount of A's debts as they were compromised. *Iddings v. Bruen*, 4 Sandf. Ch. 223.

Where a retiring partner has sold his interest to the others, received payment for the greater part, and accepted the managing partner as his exclusive debtor for the balance, the latter is entitled to nothing more than such credit as would follow the payment of an ordinary debt of the new concern. One rule must govern the charging of each member's account with the firm, unless there is a special agreement to the contrary. *Chandler v. Sherman*, 16 Fla. 99.

Where, in an accounting between partners, it appears that one of them, during the continuance of the partnership, had immediate charge and control of the firm's book of account, and the exclusive management of its finances, and the custody and control of its money, and the moneys received in the firm business exceed the moneys dis-

sively. The principles upon which this is to be done have been explained in previous chapters. Referring the reader, therefore,

bursed in such business, and it does not appear that the excess was applied to the use of the firm and for its benefit, such excess is presumed to remain in the hands of the partner so having the control and custody of the firm money, and he is properly chargeable therewith in the accounting. *Johnson v. Garrett*, 23 Minn. 565.

A partner sued his two co-partners for a final accounting and settlement of the co-partnership affairs, and it appeared that the two partners sued had previously received jointly \$1,281 more than they were entitled to, and the plaintiff \$1,281 less than he was entitled to. While the action was pending, the plaintiff settled with and discharged from all further liability one of the defendants: *Held*, that the judgment in favor of the plaintiff and against the other defendant should be for one-half of \$1,281, to-wit: \$640.50. *Lord v. Anderson*, 16 Kan. 185.

Where cattle were bought by the complainant and defendant as partners or on joint account, with \$1,100, furnished by the complainant, \$1,000 of which was money belonging to a prior firm of complainant, defendant and a third person, and \$100 of complainant's own money, and the third person disclaimed being interested in the purchase or the money used, whose answer was found to be true, and it appeared that the cattle had been sold at a profit of of \$120, a decree on bill for an account against the defendant, who received the entire proceeds, giving him one-third of the \$1,000 capital, and giving the balance to the complainant, was held proper as adopting the correct basis for stating the account as to the sum invested. *Bullock v. Ashley*, 90 Ill. 102.

If part of the members of a former

co-partnership sell the part or share of another partner without his consent, they must account to him, not at the value fixed by themselves, but at the real value. *Phillips v. Reeder*, 18 N. J. Eq. 95.

When the partners invest unequal amounts in the capital stock of the firm, and one of their articles provides that all profits and losses shall be shared equally, and another provides that at the close of the partnership the assets and property shall be divided between them, in the proportion of their investments, in such final distribution all losses will be first considered and equalized, though no profits or losses have been adjusted or declared during the co-partnership. *Raymond v. Putnam*, 44 N. H. 160.

In making a final settlement and division of partnership property, the court will look into the peculiar circumstances, and where there is real estate which has been improved by one partner individually, he will, if possible, be allowed for his improvements, and on a partition of the real estate will be allowed to retain the improved portion. *Cooper v. Frederick*, 4 G. Greene, 403.

On a bill by the representatives of a deceased partner, against surviving partners, for an account, the surviving partners should not be charged with the value of the partnership assets at the exact date of the deceased partner's death, but only with such sum as, by the use of reasonable diligence, they might have obtained for them in closing the partnership business. *Moore v. Huntington*, 17 Wall. 417. Nor should they be charged with the value of real estate of the partnership, the title to which is left by the decree, in the heirs of the deceased partner. *Moore v. Huntington*, 17 Wall. 417.

to them, and reminding him that, in taking accounts between partners, attention must be paid, not only to the terms of the partnership articles, but also to the manner in \*which they \*974 have been acted on by the partners (*d*), there remains but little to add on the present subject, except as regards just allowances, the period over which the account is to extend, and the evidence upon which it is to be taken.

*With respect to just allowances.*

Just allowances are made, although the decree is silent as to them (*e*); and when a partnership account is decreed, it is not usual for the Court to determine beforehand <sup>Just allow-  
ances.</sup> what are, and what are not, just allowances. That is determined on taking the account; and, if necessary, the decree will direct the chief clerk to state the facts and reasons upon which he shall adjudge any allowances to be just allowances. (*f*) What ought to be so allowed must be determined by the articles of partnership, and by the principles discussed in a preceding chapter. (*g*)

In stating an account between an executor and the surviving partner of the testator, it is not error to charge the surviving partner with the value of a note due the testator of the plaintiff individually, if such note arose from, or grew out of the business of the co-partnership. *Royster v. Johnson*, 73 N. C. 474.

A surviving partner can claim only one-half the balance due the firm by a deceased partner, as the remaining half was at his death due to himself. *McCormick's appeal*, 55 Pa. St. 252.

Where a partner having charge of the business and keeping the books of the firm, refuses to account and show what the profits were, it is proper, in stating the account, to decree the payment of the capital advanced by his co-partner, with interest thereon, the latter being willing to accept that. If the profits

were less than the interest the defendant should have rendered an account showing such fact. *Pearce v. Pearce*, 77 Ill. 284.

(*d*) See *ante*, pp. 820, 850, and *Watney v. Wells*, 2 Ch. 250. It is said a partner is not to be charged as such with what he might have received, without his willful default, *Rowe v. Wood*, 2 J. & W. 556, but *quere* whether a surviving partner could not be made so to account, as he alone can get in the assets of the firm. See, also, *Bury v. Allen*, 1 Coll. 604.

(*e*) See Cons. Orders 26, rule 16.

(*f*) See *Crawshay v. Collins*, 2 Russ. 347; *Brown v. DeTastet*, Jac. 294, 293, and 299; *Cook v. Collingridge*, Jac. 623, 625, *Wedderburn v. Wedderburn*, 2 Keen, 753.

(*g*) *Ante* p. 774 *et seq.*

*With respect to the period over which an account is to extend.*

This can only be determined by ascertaining (1) the time from which it is to begin, and (2) the time at which it is to cease.

The time from which the account is to begin, will, in a general account of partnership dealings and transactions, be the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure. (h) \*If there has been an account settled so as to be binding on the parties, such account will not be re-opened. (i)

This used to be provided for in the decree by the insertion of the clause, "And if, in taking the said account, it shall appear that any account has been settled and agreed upon between the parties up to any given time, the same is not to be disturbed." (k) It is not, however, now usual to insert these words, it not being the practice to disturb settled accounts, unless there is some special direction to that effect. (l)

Where partners have had dealings together preparatory to the commencement of their partnership, these dealings cannot be excluded from consideration in taking the partnership accounts. As observed by Lord Langdale in *Cruikshank v. McVicar* : (m)

Dealings anterior to commencement of partnership.

"Some things must be done by way of preparation for or introduction to the real transactions of the partnership business. Again, when the partnership business is, in one sense, at an end, still you have not therefore put an end to the joint transactions; they must necessarily be carried on for the purpose of winding up the concern and everything belonging to it. So that when you speak of partnership dealings and transactions, you are not to exclude from your consideration those transactions and matters which are necessary by way of introduction or preparation for a partnership dealing, nor are you to exclude those which afterwards follow for the purpose of winding up the concerns of the partnership."

(h) See *Cook v. Collingridge*, Jac. 624; *Beak v. Beak*. Rep. Temp. Finch. 190. An incoming partner has no right to profits made before he became a partner, unless there is an agreement to that effect. *Gordon v. Rutherford*, T. & R. 373. See, as to the statute of limitations, *ante*, p. 963 *et seq.*

(i) See *ante*, p. 967.

(k) Seton, 276, ed. 2.

\*On a bill to settle a partnership in

a land speculation and state the account, where the parties have had a previous settlement, the court will adopt such settlement as the basis upon which to adjust the subsequent dealings. *Colehour v. Coolbaugh*, 81 Ill. 29.

(l) *Newen v. Wetten*, 31 Beav. 315. Compare *Milford v. Milford*, MacCl. & Y. 150.

(m) 8 Beav. 116.

The time at which an account of partnership dealings and transactions is to stop will, naturally, be the date of the dissolution of the firm. (*n*) Not that no account is to be taken of what occurs after that date; for some time or other must elapse between the dissolution and the final winding up of the affairs of the concern, and such time cannot in fairness to any one be excluded from consideration. (*o*) Notwithstanding dissolution, a partnership is deemed to continue so far as may be necessary for the winding up of its affairs (*p*); and an account of \*partnership dealings and transactions, although in one \*976 sense it stops at the date at which the partnership is dissolved, must still be kept open for the purpose of debiting and crediting the proper parties with the moneys payable by or to them in respect of fresh transactions incidental to the winding up, as well as in respect of old transactions engaged in prior to the dissolution. (*q*)

2. Time up to which the account is to be taken.

Moreover, upon the retirement, bankruptcy or death of a partner, it often happens that the continuing or surviving partner carries on the partnership business without coming to any settlement of the partnership accounts, and without paying out the share of the late partner. When this is done, questions of great difficulty arise, which it is now proposed to investigate.

Subsequent profits when a dead or retired partner's capital has been left in the concern.

*Account of profits subsequent to dissolution.*

Before adverting to the decisions which define and illustrate the right of a late partner, or of his representatives, to an account of the profits made by his continuing or surviving partners by the use of his capital in their business, it will be useful to consider the principles applicable to a more abstract question, which may be put thus: If a person trades with prop-

General principles.

(*n*) See, accordingly, *Beak v. Beak*, Finch. 191, a case of dissolution by death; *Jones v. Noy*, 2 M. & K. 125, a case of dissolution by decree on the ground of lunacy.

(*o*) See *per* Lord Eldon in *Crawshay v. Collins*, 2 Russ. 345; *Hale v. Hale*, 4 Beav. 375.

(*p*) See, as to this, *ante*, pp. 411 *et seq.*

(*q*) See *Willett v. Blanford*, 1 Ha. 270; and as to the difference between the accounts before and after the date of dissolution, see *Watney v. Wells*, 2 Ch. 250. See, also, *Booth v. Parks*, 1 Moll. 465, and *ante*, pp. 806, 839.

erty which does not belong to him, what are the rights of the owner against him in respect of the profit he has made?

First, let us suppose that the property is used in trade by agreement with the owner; then the agreement will regulate the rights of the owner. Consequently, if a partner agrees that when he dies or retires his capital shall remain in the business at interest, those who carry on that business will be accountable for the capital and interest, and nothing more. (*r*) Further, if executors or trustees lend trust money to a stranger at interest, the obligation of the borrower is limited to repayment of the money lent, with interest; and it is immaterial \*977 \*whether he has employed the money in trade or not, and whether the money was lent to him properly or improperly. (*s*) But a loan by A to B must not be confounded with capital brought by A into a firm of A and B. (*t*)

Next, let us suppose that the property is wrongfully used in trade, without any agreement express or tacit with the owner; and let us suppose that there is no trust relationship between the trader and the owner. The trader's liability in this case will be to restore the property, and to make to the owner proper compensation for its detention. But what is proper compensation? Is it interest, or the profits made by the trader by the use of the property in question? or the profits which the owner would (probably) have made if he had had the property itself? The profits which the owner might have made can only be guessed at, and this is a sufficient reason for rejecting these profits as a measure of compensation. On the other hand, to limit the compensation to interest (at the accustomed rate) would frequently enable the wrongdoer to profit by his own wrong, and be an inadequate compensation to the owner. It may, therefore, be necessary to give him the profits made by the trader by the use of the property in question. To do so may moreover be justified upon the ground that the profits are accretions to the property which has yielded them, and ought to belong to the owner of such property, in accordance with the maxim, *accessorium sequitur*

(*r*) *Vyse v. Foster*, L. R. 7 H. L. 318, and 8 Ch. 309, where one of the surviving partners was an executor of the deceased.

(*s*) See *Stroud v. Gwyer*, 28 Beav. 130,

approved in *Vyse v. Foster*, 8 Ch. 309, *infra*, 989.

(*t*) See *Travis v. Milne*, 9 Ha. 141, and *Flockton v. Bunning*, 8 Ch. 323, note, *infra*, p. 985.

*sum principale.* (u) At the same time it may not be always right to restrict the owner's compensation to the profits made by the use of his property ; for it may happen that it has made no profit, or less profit than interest at the current rate. (x) Compensation to the owner being the object in view, it would be only fair to give him the option to take interest or the profits made by the use of his property. (y)<sup>1</sup>

(u) See Sir Sam. Romilly's argument in 15 Ves. 224; Sir T. Plumer in 1 Jac. & W. 132 and 133. See, also, *per* Romilly, M. R. in 15 Beav. 392, and 22 Beav. 100.

(x) As in *Booth v. Parkes*, Beatty 444.

(y) See acc. *infra*, p. 982; but he cannot have both. See *Heathcote v. Hulme*, 1 Jac. & W. 122. See *Bernie v. Vandever*, 16 Ark. 616.

<sup>1</sup> If, after the dissolution of a partnership, either party continues the use of the partnership property, he may be required to account for such use, although it was only a partnership in proceeds, and not in the stock. *Pine v. Ormsbee*, 2 Abb. Pr. N. S. 375.

A partner who has expelled his co-partner, and, under the permission of the chancellor, carried on the business, retaining the stock and assets in preference to having a sale and division, must render an account, and pay to his co-partner his share of the profits. *Shiddell v. Messick*, 4 B. Mon. 157.

Where a partnership consists of three persons, and the whole capital is furnished by two, and these two have a right to dissolve the partnership, and do dissolve it, and transfer the whole stock to a new partnership and business, the other partner, he being indebted to the firm to a greater amount than his share of the profits, cannot follow the old capital stock into the new concern, and claim a share of the profits. *Hyde v. Easter*, 4 Md. Ch. 80.

Though it is a general rule that when upon a dissolution of a partnership the

continuing partner carries on the business with partnership stock, he is liable to the outgoing partner for his full share of the profits; yet this rule does not apply, where, at the date of the dissolution, the outgoing partner has drawn out his capital and has no property in the concern, but is indebted to it. *Taylor v. Hutchison*, 25 Gratt. 536.

The rights of parties in relation to the rents and profits of property which had belonged to a partnership, but which had accrued intermediate to the entry of a decree of dissolution in the lower court, and the decision of an appeal to the Supreme Court, must be determined in the same manner and by the same rule by which they would have been determined had they accrued prior to the decree of dissolution. *Clark v. Jones*, 50 Cal. 425.

If, upon the dissolution of a partnership, it is agreed that the partners who remain shall take the property, and close up the business of the firm, and a final settlement between the outgoing and remaining partners is postponed until the adjustment of the outstanding accounts, and the remaining partners subsequently receive upon a particular adventure of the firm an advance which proves to be more than is realized from the adventure, and do not repay the excess, such advance is to be treated, in a suit in equity against the outgoing partner for a settlement, as having been made for the benefit of all the partners. *Tyng v. Thayer*, 8 Allen, 391.

In the case of a partnership in a commission and warehouse business, where

8. Where capital is wrongfully employed in trade by a trustee.

\*978

\*Now let us suppose that the trader is a trustee of the property, and that he employs it in trade contrary to his trust. The reasons for charging him with interest, or the profits made by the property at the option of its owner, are as applicable to this case as to that last investigated; but there is in this case an additional reason for so charging him, for it is a well-established rule that no trustee shall himself derive profit from the use of the trust property. (z)

There remains for consideration the mixed and difficult case in which a trustee has improperly employed the trust property in a trade carried on by himself in partnership with others who are not trustees. The liability of the trustee in this case to be charged (at the option of the cestui que trust) with interest or with the profits which he (the trustee) has derived from the use of the trust property is well established (a); but it has sometimes been considered that he ought to be charged with all the profits made by the firm by means of the trust property. This view is apparently based upon the ground that the profits are accretions to the trust property; and that the trustee is as much liable for them as for the property itself; and that he is not discharged from this liability by the circumstance that he has divided the profits with his co-partners. But, plausible as this view is, it must be remembered that in the case now supposed the profits have not all been earned or received by the trustee, but by himself and others, and that he is not in a position to make them refund their shares of the profits yielded by the trust property. It would therefore be highly unjust to make the trustee accountable for more than his own share of such profits; and this view has been adopted by the courts of appeal both in England and Scotland. (b)

one partner engages to furnish the buildings and the other to superintend the business, if the latter partner dies, his estate will be entitled to share in profits from the storage of cotton stored in his life-time, though not realized by the disposal of the cotton till after his death; after deducting the actual expense of the delivery of the cotton to the bailors, or of its sale, including the keeping of the accounts thereof; also to

share in any proceeds realized by sale of unclaimed cotton remaining on storage. *Parnell v. Robinson*, 58 Ga. 26.

(z) See, as to the liability of the trustee, *Docker v. Somes*, 2 M. & K. 655.

(a) See *Jones v. Foxall*, 15 Beav. 388, where the trustee was charged with compound interest at 5 per cent. See Lord Selborne's observations on this case in *Vyse v. Foster*, L. R. 7 H. L. 346.

(b) See *Vyse v. Foster*, L. R. 7 H. L.

\*The same considerations lead to the conclusion that a co-trustee who is not himself a member of the firm deriving profit from the use of the trust money and who consequently does not himself derive any profit from that use, is not accountable for any of the profits yielded by the trust property. (c)

b. Liability of trustee not sharing profits.

Lastly, we have to consider the position of the partners who are not trustees, but who have shared the profits derived from the use of the trust property. With respect to them, the first thing to ascertain is whether they are personally implicated in any breach of trust; for if not, they are under no liability in respect of the profits in question—indeed they may not even be liable to make good the trust money. (d) But if they have traded with the trust money knowing that its employment in trade was a breach of trust, they incur the same liabilities in respect of it as if they were themselves trustees. Consequently they become jointly and severally liable as well for the trust property itself as for the profits which they have made by it. (e) But this liability cannot be enforced except in an action to which they are all parties. (f) It has, indeed, been doubted whether there is any joint and several liability as regards profits, and whether the non-trustee partners are liable for more than the trust property and interest. (g)

c. Liability of partners who are not trustees.

Assuming that a person is entitled to an account of profits made by the use of his property in trade, it is obviously often extremely difficult to ascertain these profits. To take the ordinary case of surviving partners continuing to trade with the capital of a deceased partner, great difficulty will be found in arriving at the share of profits to which the executors of the deceased are entitled.

Practical difficulty in carrying out the foregoing principles.

318, and 8 Ch.(309); *Laird v. Chisholm*, 30 Scottish Jur. 582. In both of these cases the trustees only were sued. See, also, *Jones v. Foxall*, 15 Beav. 388, p. 395; *Palmer v. Mitchell*, 2 M. & K. 672. Whether the case would be different if all the other partners were parties is doubtful. See *Vyse v. Foster*, *ubi supra*.

(c) See *Vyse v. Foster*, *infra*, 989.

(d) *Ante*, p. 311.

(e) See, accordingly, *Flockton v. Bunning*, 8 Ch. 323, note, *infra*, 985.

(f) See *Vyse v. Foster*, and *Laird v.*

*Chisholm*, *ubi supra*; *Simpson v. Chapman*, 4 DeG. M. & G. 174, *per* Turner, L. J. Compare *Brown v. De Tastet*, Jac. 284; *Macdonald v. Richardson*, 1 Giff. 81; *Bowes v. City of Toronto*, 11 Moore, P. C. 463.

(g) See *Vyse v. Foster*, *infra*, p. 989; *Stroud v. Gwyer*, 28 Beav. 130; *Macdonald v. Richardson*, 1 Giff. 88. But in *Flockton v. Bunning*, 8 Ch. 323, note, *infra*, p. 985, the liability was treated as perfectly clear.

It is very easy to say they can be calculated by the rule of \*980 \*three—as the whole capital is to the whole profits, so is the late partner's share in the capital to his share of the profits—but this assumes that the profits in question have been made by capital only.<sup>1</sup> Profits, and very large profits, may be made by skill, and an extensive connection, with little or no capital; and even if there be capital, the profits may be attributable less to it than to other matters, and it may be impossible to determine with any precision the extent to which the capital has contributed to the realization of the profits obtained. (*h*) Special inquiries on this subject, therefore, are almost always necessary, and if it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the use of the capital or assets of the late partner, his *prima facie* right to share such profits will be effectually rebutted.

The extent of the liability to account for subsequent profits was elaborately discussed by the late V.-C. Wigram in *Willet v. Blanford* (*i*), and the conclusion arrived at by him was, that no general rule could be laid down upon the subject, and that every case must depend on its own circumstances. "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties." This conclusion of the Vice-Chancellor was entirely in accordance with previous decisions (*k*), and has been approved by subsequent judges; and in conformity therewith several cases have since been decided, in which profits acquired after the death of a partner were held to belong wholly to those by whose labor they had been made. An element of uncertainty is thus introduced into an already difficult and complicated branch of law, and

(*h*) This difficulty was felt very strongly in *Featherstonhaugh v. Turner*, 25 Beav. 382, noticed *infra*, p. 991.

(*i*) Ha. 253.

(*k*) See in particular Lord Eldon's observations on *Crawshay v. Collins*, in Jac. pp. 622 and 297, and 2 Russ. 330.

<sup>1</sup> If a court of equity fix upon an antecedent time, at which a partnership

shall be considered as having determined, and it appear that the capital of one partner was subsequently employed by another, who continued to carry on the business, the former is entitled to such a proportion of the profits as his capital thus retained bears to the whole capital. *Durbin v. Barber*, 14 Ohio, 311.

renders it extremely embarrassing; but it is hoped that the foregoing attempt to explain its principles may tend to introduce more certainty in their future application.

\*Passing now to the decisions, to which the foregoing observations are intended to serve as an introduction, the right to an account of profits subsequent to a dissolution will be found distinctly laid down in the following cases.

The first case of importance on the subject is *Crawshay v. Collins*. (l) There one partner had become bankrupt, and the solvent partners had carried on the business without paying out the bankrupt's share of the assets, and an inquiry was directed with a view to ascertain whether profits made subsequently to the bankruptcy were made by the application of the funds which then constituted the capital of the concern (m), or by the application of any other, and what funds; and the master was directed to distinguish between capital and stock in trade. (n) The object of this inquiry was to ascertain whether the profits made after the dissolution were actually made by the application of the funds that belonged to the bankrupt as a member of the partnership. (o) And it appearing that such profits were made, it was held by Lord Eldon, and afterwards by Lord Lyndhurst (on a re-hearing), that the assignees had a right to a share of these profits, and that the account could not stop until the claims of the assignees were satisfied. The bankrupt was originally entitled to three-eighths of the partnership assets, and although he was indebted to the firm, so that the sum actually payable to him was less than three-eighths of the net assets of the firm, and although the continuing partners had brought in a large additional capital since the bankruptcy, still the assignees were held entitled to be credited throughout with three-eighths of the profits, being debited with what the bankrupt owed. The decree in this important case declared that the three-eighth parts or shares of the bankrupt in the partnership ought to be considered as continuing notwithstanding, and after, his bankruptcy; and that the assignees

(l) 15 Ves. 218; 1 J. & W. 267; and 2 Russ. 325. The decision in 15 Ves. 218, was afterwards said by Lord Eldon not to have gone to the extent ordinarily supposed. See Jac. 296 and 622, and 2 Russ. 330. *Brown v. Vidler*, cited in 15 Ves. 223, and 2 Russ. 340, is an earlier

case in point. See, too, *Brown v. Litton*, 1 P. W. 141, and 10 Mod. 20; *Hammond v. Douglas*, 5 Ves. 539.

(m) 15 Ves. 218.

(n) 1 J. & W. 267.

(o) 2 Russ. 337.

\*982 were entitled to three-eighth parts of the \*profits which had been already reported to have been made; and three-eighth parts of such further profits as (on taking the further accounts thereby directed) should appear to have been made. (*p*)

So, in *Brown v. De Tastet* (*q*), where one partner died and the survivor carried on the partnership business, without accounting for the share of the deceased to his administratrix, an account was directed at the suit of the administratrix, not only of the dealings and transactions of the partners up to the death of the deceased partner, but also of the property of the deceased in the hands of the surviving partner, and of all profits and gains made by him by means of such property.

The rule established in these cases has been since applied in a variety of instances; *e.g.*, where a managing partner had continued the business after the period fixed for the dissolution and winding up of the partnership (*r*); where a partner had become lunatic and the firm had been dissolved, but the business had been continued by the other partners, and they had not paid out the capital of the lunatic partner (*s*); where partners had agreed to dissolve and to have the partnership business wound up, and its assets got in and converted by a third person, and one of the partners nevertheless carried on the business in the meantime for his own benefit (*t*); where a mining partnership had been dissolved, but one of the partners had obtained a renewed lease of the mine, and had continued to work it for his own benefit. (*u*)

In the foregoing cases it will be observed there was no relationship of trustee and *cestui que trust* (as distinguished from that of late partnership), subsisting between the persons who made the profits and those who were held entitled to share them. But even where there is no true relationship

\*983 of trustee \*and *cestui que trust*, partners continuing to

(*p*) 2 Russ. 347. It is said in 2 M. & K. 658, that this case was affirmed by the House of Lords, and after all to have been abandoned by the plaintiff, who found it impossible to work out the decree.

(*q*) Jac. 284. See, too, *Featherstonhaugh v. Turner*, 25 Beav. 382; *Smith v. Everitt*, 27 ib. 446; *Booth v. Parks*, 1

Moll. 465, and *Beatty*, 444.

(*r*) *Parsons v. Hayward*, 31 Beav. 199, affirmed on appeal, 4 DeG. F. & J. 474.

(*s*) *Mellersh v. Keen*, 27 Beav. 236.

(*t*) *Turner v. Major*, 3 Giff. 442.

(*u*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298. See, too, *Clements v. Hall*, 2 DeG. & J. 173.

carry on business without coming to an account with their late partner, or those who represent him, are liable to be charged either with the profits made by the use of his capital, or with interest on it at 5% per cent., at the option of those to whom such capital belongs (*x*); but in taking an account of subsequent profits, the partner by whose exertions they have been made is usually allowed compensation for his trouble (*y*), unless he is, in the proper sense of the word, a trustee, and guilty of a breach of trust, when no such compensation is allowed. (*z*)

The rights of legatees and next of kin of a deceased partner against his executors where they are themselves surviving partners or have themselves become partners since his death, are illustrated by the following decisions.

Account of subsequent profits against executors who are surviving partners.

In *Cook v. Collingridge* (*a*), the executors of a deceased partner sold their testator's share to the surviving partners, who resold it to one of the executors. The sale was set aside at the instance of a legatee, and an account of profits made subsequently to the death of the deceased partner was decreed, although the money paid for the testator's share was not continued in the business.

*Cook v. Collingridge.*

In *Townend v. Townend* (*b*), three brothers, A., B., C., were in partnership under articles by which it was provided that the capital of the partners should not be withdrawn until the expiration of seven years from that date; that in case of the death of one of the partners within that term, a valuation of his share should be made, and that the surviving partners should pay to his representatives the amount of such valuation within three years from the said term of seven years, and in the meantime give sufficient security for the same by a \*mortgage of a competent part of the partnership property. \*984 It was also provided that it should not be lawful for the representatives to commence any action for recovering payment of the

*Townend v. Townend.*

(*x*) *Booth v. Parks*, 1 Moll. 465, and *Beatty* 444. See also *Clements v. Hall*, 2 DeG. & J. 186; *Toulmin v. Copland*, 2 Ph. 711, reversing S. C. 4 Ha. 41.

(*y*) *Brown v. De Tastet*, Jac. 284. See also, *ib.* 623; *Featherstonhaugh v. Turner*, 25 Beav. 382; *Mellersh v. Keen*, 27 *ib.* 242.

(*z*) *Stocken v. Dawson*, 6 Beav. 371,

and 9 *ib.* 247; *Burden v. Burden*, 1 V. & B. 170. See, however, *Cook v. Collingridge*, Jac. 622, 623.

(*a*) Jac. 607. See the decree in 27 Beav. 456. *Stocken v. Dawson*, 9 Beav. 239, and on appeal 17 L. J. Ch. 282, was a somewhat similar case.

(*b*) 1 Giff. 201.

share of the deceased, until the end of three years after the expiration of the term of ten years, nor to claim any participation in the profits made after the day up to which the valuation was made; the expressed intention being that the representatives of the partner dying should take 5*l.* per cent. on the value of the share in lieu of profits. It was further provided that nothing should prejudice the right of the representatives within the term of seven years, to take any proceedings in order to obtain a fair valuation, or to obtain and enforce the mortgage security. In April, 1844, A. died, having by will devised his real and personal estate to B., C., and D. upon trust to raise the sum of 12,000*l.* and invest the same in government or real security, and apply the proceeds towards the maintenance and education of the plaintiff, his then infant daughter, and accumulate the surplus at compound interest; and upon his daughter attaining twenty-one, to pay the accumulations to her, and to stand possessed of the capital on trust to pay her the proceeds during her life. The testator's estate consisted almost entirely of his share in the partnership. In December, 1844, a valuation was made, by which the testator's share was ascertained to be 20,000*l.* and upwards. In June, 1853, being more than ten years from the date of the articles, certain hereditaments, consisting of freeholds, leaseholds, and machinery (part of the partnership assets), were mortgaged by B. to C. and D., as a security for the 12,000*l.* (c) The plaintiff came of age in 1857, and in 1858, B. and C. rendered to her an account of the trust funds, in which they debited her with various items for maintenance and education, with 5*l.* per cent. interest thereon, and credited her with the sum of 12,000*l.* and interest at 5*l.* per cent. with yearly rests, up to the 1st May, 1853, and thenceforth with interest at 4*l.* per cent. with yearly rests. The plaintiff, however, insisted that the 12,000*l.* had been continued in the partnership business, and she filed a bill against B., C., \*985 and D. for an account of the \*profits made in the partnership business on the sum of 12,000*l.* from the testator's death, and for payment of what should be found due to the plaintiff, alleging that the mortgage was an improper security. The Court held, 1, that the plaintiff was entitled to an account of the legacy of 12,000*l.*, with interest at 5*l.* per cent. from one year after the testator's death up to the 1st January, 1849 (ten years from the

(c) The property, so far as it could be not an adequate security for 12,000*l.*  
regarded as an authorized security, was

date of the articles), and with compound interest on the surplus, after allowing for sums expended for her maintenance and education; 2, that the plaintiff was entitled to an account of the profits made by the partners from the 1st January, 1849, on the balance found due for the principal at that date, with interest at 5% per cent. and annual rests; 3, that she was entitled to a decree for payment or what should be so found due; and, 4, that the entry of the sum of 12,000*l.* in the account furnished by B. and C. must be taken as conclusive against them that they had such a sum in their hands. It was considered that the mortgage had not the effect of withdrawing the 12,000*l.* from the business: it was part of a plan for keeping the money in the business; and the 12,000*l.* ought not to have been left on the security of property from which the trustees ought to have recovered it.

In *Macdonald v. Richardson* (*d*), a partner died, leaving his co-partner and another person his executors, and the co-partner executor afterwards took other persons into partnership with him. The testator's assets having been kept in the business, the legatees filed a bill against the executors, and them only, claiming an account of profits since their testator's death, and a decree was made in their favor. (*e*)

In *Flockton v. Bunning* (*f*), a partner died, leaving his wife his executrix, and having directed her to get in his estate and invest it for the benefit of herself and children. She wound up the partnership in which her husband was engaged, but continued to carry on the business with his capital, in partnership with other persons, who knew that in so doing she and \*they were committing a breach of trust. (*g*) A bill was \*986 filed by some of the children against her and her co-partners, seeking to make them jointly and severally liable for the trust estate employed in the business, and for the profits made by its use; and a decree to that effect was made, and was affirmed on an appeal by the wife's partners. This case was decided on the principle that the wife's partners were clearly implicated in the breach

(*d*) 1 Giff. 81. See, also, *Docker v. Somes*, 2 M. & K. 655. ♦

(*e*) It is not quite clear whether the executor, who was a partner, was ordered to account for more profits than he received or not.

(*f*) 8 Ch. 323, note. The writer was

counsel for the appellants, and this statement of the case was written from the short-hand writer's notes of the judgment.

(*g*) In fact, she agreed to indemnify them against the consequences.

of trust committed by her, and were jointly and severally responsible with her for the trust estate and all the profits made thereby. The widow's capital was trust property; there was no loan, as in *Stroud v. Gwyer* (*h*), but the widow's capital became part of the capital of the firm; and she and her co-partners wrongfully traded with it. (*i*) Both L. J. Wood and the L. J. Selwyn agreed that a mere loan, although in breach of trust, would not involve liability to account for profits, but that trust property which was traded with by a trustee in partnership with others could not be regarded as a loan. (*k*)

The right of the *cestui que trust* against his trustee in these cases is to an account of profits made by him by the use of the trust property, or at the option of the *cestui que trust* to simple interest at 5*l.* per cent. (*l*); or in special cases to compound interest. (*m*)

The next class of cases which it is necessary to notice is that in which surviving or continuing partners were held not liable to account for profits made after dissolution.

The first of these was *Simpson v. Chapman*. (*n*) There three persons were partners as bankers. The bank was in such good credit as to render no capital necessary for the purpose of carrying it on. One of the partners died, leaving his son, one of the surviving partners, and a third person, his executors. At the time of his death the assets of the bank exceeded its liabilities. The estate of the deceased was a creditor of the bank to the extent of his share, viz., one-third of its net assets, but there was a much larger sum owing from his estate to the bank on his overdrawn private account. The son, being also an executor of the deceased, was admitted as a partner in the bank, and the business was carried on by the son and surviving partners, but the

(*h*) 28 Beav. 130, *ante*, p. 977.

(*i*) Compare this case with *Vyse v. Foster*, L. R. 7 H. L. 318, and 8 Ch. 309, noticed *infra*, p. 989.

(*k*) See, also, as to this, *Travis v. Milne*, 9 Ha. 141, where, however, interest only was ordered to be paid.

(*l*) *Heathcote v. Hulme*, 1 Jac. & W. 122.

(*m*) If the trustee's duty is to call in the money and accumulate the income, he will be charged with compound in-

terest; there may possibly be other grounds for so charging him. See *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, ib. 461, and Lord Selborne's observations in *Vyse v. Foster*, L. R. 7 H. L. 346.

• (*n*) 4 DeG. M. & G. 154. This case is the more important as the non-liability to account for subsequent profits was decided on the hearing of the cause.

amount of the deceased's share in the business was never paid out, or separated from the moneys of the bank. Considerable profits were made by the new partnership, and of these the son, as partner, received his share. A suit was instituted for the administration of the estate of the deceased, but to such suit the executors alone were defendants, and a decree was made charging the son, and the surviving partner, who was an executor, in respect of the profits of the bank from the death of deceased, paid to the son, so far as such profits had accrued from the assets of the deceased employed in the partnership. This part of the decree was appealed from and reversed, and one of the grounds for the reversal was, that the profits acquired after the death of the deceased could not be attributed to the use made of his capital. If the debt due from him to the bank were omitted from its assets, the bank was at his death insolvent. The deceased had no capital in it in the ordinary sense of the word, and all the profits which had accrued were attributable to the connection and reputation of the bank. It was urged that the son, who had received one-third of the profits, and who could not distinguish how much of them was attributable to his character of executor, and how much belonged to him in his individual character as partner, ought to be charged with the whole. But it was held that this principle did not apply, inasmuch as he did not carry on the business as an executor, but in his own separate and individual right, conceiving that he was entitled so to carry it on.

Another case of the same class was *Wedderburn v. Wedderburn* (o).

There three persons were partners as merchants; \*one died, leaving the other two and his \*988

*Wedderburn v. Wedderburn.*

widow his executors. The surviving partners alone proved the will, and they drew up an account of the partnership assets and credited the estate of the deceased with a certain sum as his share in the concern, but this share was never separated from the assets of the continuing firm. Several changes afterwards took place in the new firm, and then a suit was instituted by persons interested in the estate of the deceased partner, against the executors and surviving partners of the deceased, praying for an account of his estate, and for an account of the gains and profits made by carrying on the partnership after his death. A decree was made directing an account of the personal estate of the deceased partner; and of the dealings and transactions of the firm up to his

death; and of what at that time was the value of his interest in the concern; and of the profits of the trade carried on by the succeeding firms; and of the moneys which were from time to time taken out of the concern, and applied on account of the estate of the deceased; and of the amount of capital from time to time employed in the said firms respectively (*p*). It appeared that at the death of the deceased the assets of the firm consisted almost entirely of debts due to it; that it was impossible, except at a great sacrifice, to get in these debts in a short time; that if an attempt had been made to wind up the affairs of the concern at the death of the deceased, the assets of the firm would not have sufficed to discharge its liabilities; and that the ultimate solvency of the firm was attributable to the cautious and prudent conduct of the surviving partners, and to their having, from time to time, provided large sums of money to meet pressing liabilities (*q*). It thus, in fact, appeared that the profits made since the death of the deceased were made by the credit and connection of the house, and by the reputation, skill, and ability of the surviving and later partners, and were not attributable to the surplus assets of the firm in which the deceased had a share. It further appeared that the share of the deceased had been preserved entirely by the prudent management of the executors, and would

have been certainly reduced to nothing if they had wound up  
 \*989 the affairs of the \*house in the ordinary way, or had thrown the estate of the deceased into Chancery. Under all the circumstances of the case it was therefore held that as by the partnership articles the plaintiffs had no interest in the good-will of the concern, they were not entitled to participate in the profits made by the successive firms, so far as those profits were attributable to the good-will and connection in trade of the old firm; and that their share in any profits attributable to any other source was covered by interest on the amount at which the share of the deceased had been valued.

Lastly, in *Vyse v. Foster*, (*r*) the partnership articles provided that on the death of a partner the amount of his share  
*Vyse v.*  
*Foster.* : should be ascertained and be paid out with interest, by installments running over two years. A partner died leaving three

(*p*) 2 Keen, 752.

(*q*) See 22 Beav. 84.

(*r*) 8 Ch. 309, and L. R. 7 H. L. Ca.

318. The case came again before the

court as to the mode of ascertaining the amount due to the deceased, see 10 Ch. 236.

executors, one of whom was a surviving partner. The share of the deceased was ascertained; it was not, however, paid out at the end of two years, but was kept in the business, which was carried on for many years, first by one and then by two of the executors, with other persons. The continuing firms paid interest on the capital of the deceased partner, and all the persons beneficially interested in his estate, except the plaintiff, acquiesced in this arrangement. The plaintiff, soon after coming of age, demanded her share of the estate of the deceased, and also the profits made by its employment in the business. The firm paid her the principal sum due to her, with compound interest at 5% per cent., but declined to account to her for any profits. She thereupon filed a bill against the executors, and them alone, for an account of the profits. A decree was made in her favor, and the defendants were declared liable for all the profits made by the successive firms, by the use of her share of the deceased partner's estate. The court of appeal, however, reversed this decision, and held that although there had been technically a breach of trust in not paying out the capital of the deceased partner as provided by the partnership articles, still the plaintiff could not possibly be entitled to charge the defendants in the suit, as constituted, \*with more profits than they had themselves \*990 received; and as the evidence showed that they had acted throughout with perfect fairness, the court of appeal refused even an account of these profits, and held that under all the circumstances of the case the plaintiff was only entitled to her share of the testator's estate, with the compound interest at 5% per cent. which had been offered to her. The decision in this case is extremely important, as it decided, 1, that the clause in the partnership articles was binding both on the executors of the deceased partner and on the surviving partners, although one of them was also an executor; 2, that the amount due to the estate of the deceased was in effect a loan to the survivors, and its non-payment at the time and in manner prescribed by the articles of partnership did not entitle the plaintiff to any profits, but only to interest; 3, that even if the plaintiff's claim to profits could have been sustained, the executor who was not a partner would not have been liable for such profits; and 4, that the executors who were partners would not have been liable for more profits than they respectively themselves received. (s)

(s) See as to this *Flockton v. Bunning*, observations of Lord Cairns, in L. R. 7 Ch. 323, note, *ante*, p. 985, and the H. L. 333, 4.

The law upon the subject under consideration is still in an unsettled state. Undoubtedly a person ought not to be permitted to retain for his own use, gains acquired by the unlawful employment of another's property ; and it would certainly not be conducive to justice if there were no power to compel a discovery of the amount of the gains so made, and payment of that amount by the wrong-doer. (*t*) At the same time, owing to the extreme difficulty of taking an account of subsequent profits, so far as they are attributable only to one particular source, the tendency of the courts in modern times appears to be rather in favor of not exercising than of exercising the power alluded to, except in cases of gross fraud or breach of trust. (*u*) In such cases, however, the Court will exert itself to the utmost, and the efforts which it will make in order to prevent persons from deriving advantage from their own wrong, cannot be better illustrated than by the case of *Featherstonhaugh v. Turner*. (*x*) The profits of the partnership business there arose entirely from the skill and reputation of the partners, who were medical gentlemen. In order to ascertain the share of the deceased in the profits made after his death by the surviving partner, an inquiry was directed whether any and what profits made since the death of the deceased were attributable to or derived from persons who had become customers by reason of the deceased having been a partner, and it was considered that the surviving partner was liable to pay what might be found due on taking that account, after deducting a liberal allowance to him for his time, knowledge, and expenses in realizing the profits in question.

*With respect to the evidence upon which the accounts are to be taken.*

As regards the partnership books. These being accessible to all the partners, and being kept more or less under the surveillance of them all, are *prima facie* evidence against each of them, and, therefore, also for any of them against

(*t*) See the admirable judgment of Lord Brougham in *Docker v. Somes*, 2 M. & K. 672.

(*u*) Judgments for an account of profits after dissolution are fearfully oppressive; and the writer is not aware of

any instance in which such a decree has been worked out and has resulted beneficially to the person in whose favor it was made.

(*x*) 25 Beav. 332.

the others. (y)<sup>1</sup> But entries made by one partner without the knowledge of the other do not prejudice the latter as between him-

(y) See *Lodge v. Prichard*, 3 DeG. M. & G. 906, and *Smith v. The Duke of Chandos*, 2 Atk. 158, and Barn. 412. But see the observations of L. J. Turner, in *Stewart's case*, 1 Ch. 587.

<sup>1</sup>*Heartt v. Corning*, 3 Paige 566; *Fletcher v. Pollard*, 2 Hen. & Munf. 544; *Brickhouse v. Hunter*, 4 id. 363; *Richardson v. Wyatt*, 2 Dessaus. 471; *Dunnell v. Henderson* 23 N. J. Eq. 174; *Stewart v. McKichan*, 74 Ill. 122; *Albe v. Wachter*, id. 173; *Boise v. McGinn*, 8 Oreg. 466; *Cheever v. Lamar*, 19 Hun, 130; *Routen v. Bostwick*, 59 Ala. 360; *Cunningham v. Smith*, 11 B. Mon. 325; *Myers v. Bennett*, 3 Lea, 184. See, *Ferguson v. Wright*, 61 Penn. St. 258; *Sutton v. Mandeville*, 1 Cranch C. C. 2.

The rule is the same, though the books are kept by a clerk. *O'Brien v. Hanley*, 86 Ill. 278; *Allen v. Coit*, 6 Hill, 318.

One of the members of the firm kept the time of the men employed, in a pass or time book, and reported the time of each man, weekly to the book-keeper, who entered it on the books of the firm and when the men were paid, if they claimed more time than had been reported to the bookkeeper, the partner keeping the time was called in and the books corrected in accordance with the facts. Sometimes the partner keeping time was sick or absent and then the book keeper got the men's time from other sources. On a settlement of the partnership affairs, the partner who had kept the time of the men claimed that the books of the firm were incorrect, because there was more time shown by them than his time book showed: *Held*, that under the circumstances, the books as kept by the clerk were binding on both partners. *O'Brien v. Hanley*, *sup.*

The ordinary presumption is, that all the partners have access to the partnership books, and know the entries therein; but this is a mere presumption from the ordinary course of business, and may be repelled by any circumstances which tend to a contrary presumption. *United States Bank v. Binney*, 5 Mason, 176; *Shoemaker Piano Co. v. Bernard*, 2 Lea, 359.

Entries in partnership books are not evidence for one partner against another on an accounting between them, unless it appears, or may be presumed, that the latter not only had access to the books, but actually inspected them. *Taylor v. Herring*, 10 Bosw. 447; *Saunders v. Duval*, 19 Tex. 467.

The rule that entries in the books of a firm are evidence against all of the parties, is true only of those made whilst the firm is doing business. Entries so made by a partner who is winding up the partnership under a transfer to him for that purpose, are not, *per se*, evidence for him against a co-partner. *Clements v. Mitchell*, Phill. Eq. 3.

Entries, however, made after a dissolution, by the partner who closes the concern, in the partnership books which are open to the examination of the other partner, and are in fact examined by him, and from which, by agreement of the partners, an accountant has made up an account between them, are competent evidence for or against either partner. *Cameron v. Watson*, 10 Rich. Eq. 64.

Where a surviving partner and liquidator suffers several years to elapse before rendering an account, and he has kept the books so carelessly that it is impossible to determine from them with any certainty how the firm stood at its close, his account will be rejected, and he charged with all entries against him-

self and his co-partner (z); and where a surviving partner drew up an account which he furnished to the executors of his late partner,

self, and allowed credit only for such liabilities as he proves he has paid. *Leftwitch v. Leftwitch*, La. Ann. 346.

Partnership books to which each party has had access are *prima facie* evidence as between the partners, but the partners cannot, in lieu of the statement required, put in their general books of accounts, consisting often of immense folios, which neither the clerk nor the court can be required to examine. It is the duty of the parties to have them examined by experts, to ascertain what they do show, and to extract from them in the form of balance-sheets and schedules, such general statements, and such specific facts as may tend to elucidate contested matters of charge and discharge. *Meyers v. Bennet*, 3 Lea, 184.

Where a partnership account is ordered, each partner is an actor, and, unless all the parties join in employing a competent accountant to make out a balance-sheet of the business with proper schedules, each should be required to furnish his own statement of the account. *Meyers v. Bennet*, 3 Lea, 184.

The books of partnership are competent evidence to show what are debts of the partnership as against the partner who, upon the dissolution of the partnership, has purchased the assets of the partnership, and has undertaken to pay its debts. *Shackleford v. Shackleford*, 32 Grat. 481.

Books of firm are evidence that one of two partners, joint makers of a note, was surety for the other. *Strong v. Baker*, 25 Minn. 442.

Where a partner was familiar with the books of the concern, he may testify from his own recollection, so invigorated by the books, as to the amount of the advance of his co-partner beyond himself in the payment of the debts of the firm, without producing the books. *Bank v. Donaldson*, 6 Pa. St. 179.

In an action for the settlement of partnership accounts, where it appears that the parties have kept books of their daily affairs, they should be shown to be clearly erroneous, before a party should be permitted to recover beyond the same, for a matter which ought to have been entered regularly every day. *Parker v. Jonté*, 15 La. Ann.

The best evidence and data of the losses and profits of the partnership are the books of the firm, and the opinions and experience of other merchants in the same town were not admissible to determine the amount of profits. *Cunningham v. Smith*, 11 B. Mon. 325.

Where, however, the books of a partnership fail to show the true state of its business, resort may be had to a calculation of the profits from the amount of merchandize proved to have been sold by said firm, at the rate per cent. profit proved to have been made on said merchandize in that particular business, but not to expert testimony of witnesses engaged in a similar business to prove that profit was made by this firm in their business, for the purpose of charging one of the partners therewith. *Boire v. McGuire*, 8 Oreg. 466.

On the trial of an action between partners in a mill and ferry, in which

(z) *Hutcheson v. Smith*, 5 Ir. Eq. 117. See, also, *Reeve v. Whitmore*, 2 Dr. & Sm. 446, where it was held that although books kept by a person may be used against him as showing what

he has received, he is not entitled to use them in his own favor to show what he has paid. See, as to how far the books of companies are evidence against their shareholders, *ante*, p. 550.

it was held that such account was admissible against the partner who furnished it, and that the executors were not bound, by using it against him, to admit its correctness throughout. (*a*)

the issues are as to the state of accounts, and whether there have been any profits, the testimony of a witness who had run the mill and ferry previously, in partnership with one of the parties, to the effect that the expenses at that time were greater than the receipts, is irrelevant and inadmissible. *Saunders v. Duval*, 19 Tex. 467.

Where a partner had collected accounts in favor of the firm, without making any entry of the amounts so collected, it was *held*, that where the amount of such collections was ascertained he was properly chargeable therewith. *Evans v. Montgomery*, 50 Iowa, 325.

While the failure to keep accounts by the partner in charge of the partnership concerns might render an adjustment difficult, yet it could not be taken advantage of by a co-partner who had commenced an action and asked an accounting. *Evans v. Montgomery*, *supra*. As to the effect of keeping no books or of destroying them, see *ante*, 808.

As to the *onus probandi* in suits for an account, a partner who, upon the settlement of a partnership account, claims a balance due him from the firm, which is denied by the other, has the burden of proof, in the absence of entries of account made at the time of the alleged transaction. *McCabe v. Franks*, 44 Iowa, 208; *Cambat v. Tupper*, 2 La. Ann. 10; *Maupin v. Daniel*, 3 Tenn. Ch. 223; *McMichael v. Ravul*, 14 La. Ann. 307.

A partner who complains of error in the settlement of a partnership account, approved by the signature of the partners, should make it appear by proof. *Bry v. Cook*, 15 La. Ann. 493.

In a suit by one partner against another to recover contribution to a loss in the concern, a statement in the defendant's handwriting of an account showing a balance due to the plaintiff from the firm, is evidence for the plaintiff. *Yohe v. Barnet*, 3 Watts & S. 81.

In an action of account between partners, in which the plaintiff claims that the defendant account for money received by him from the avails of the business during the partnership, an agreement, executed by the plaintiff and delivered to the defendant, previous to the commencement of the action, in which it is recited, that the defendant has relinquished to the plaintiff all claim to the demands due to the firm, and to the stock of the firm, in consideration of which the plaintiff promises to pay the debts due from the firm, and to indemnify the defendant against them, has no legal tendency to sustain a plea by the defendant, that he has fully accounted for the money claimed in the declaration. *Woodward v. Francis*, 19 Vt. 434.

In an action to wind up a partnership between A and B, evidence that A put into the concern money belonging to a third person which he held as agent, is irrelevant. *Harper v. Lamping*, 33 Cal. 641.

A decree that one partner shall pay money to his co-partner without any proof of its actual or constructive receipt by the former, or that it has been lost by his negligence or misconduct, is erroneous; and where the only evidence given was that the defendant had received "a certificate of debt from the Chesapeake & Ohio Canal Company," in December, 1833, or January, 1834,

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(a) *Morehouse v. Newton*, 3 DeG. & Sm. 307.

\*992 \*Where, in consequence of the loss of books and documents, an account cannot be taken in the usual way, special directions will be given as to the mode in which the accounts shall be taken and vouched. The power to give such a direction is expressly conferred by 15 & 16 Vict. c. 86, § 54, by which it is enacted that,—

Special directions on this subject.

“It shall be lawful for the court, in any case where any account is required to be taken, to give such special directions, if any, as it may think fit with respect to the mode in which the account should be taken or vouched, and such special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the court that the circumstances of the case are such as to require such special directions; and particularly it shall be lawful for the court, in cases where it shall think fit so to do, to direct that in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised.”

Prior to the above enactment the court would, if necessary, direct the master to make a special report in case he should be unable to take an account by reason of the non-production of books, or other circumstances (*b*); and the court would, it seems, declare that, for certain purposes vouchers should not be required. (*c*) Since the enactment, it has been decided that no special directions will be given, except in cases of necessity, and where, unless such directions are given, the accounts required cannot be arrived at. (*d*)

The judgment for an account usually directs that all parties shall produce on oath all books and papers in their custody relating to the taking of the accounts. If any partner has kept accounts relating to the partnership in private books of his own, he must produce such books; for he should have kept his private accounts elsewhere, if he did not want them to

Productions of books, &c.

after a settlement with the company, and the bill which assumed its payment to him was filed in June, 1835: *Held*, that it was too short a time to authorize a presumption of payment sufficient to charge him personally, where there was nothing in the nature of the settlement to impose such responsibility. *Grove v. Fresh*, 9 Gill & J. 280.

(*b*) See *Rowley v. Adams*, 7 Beav. 395; *Millar v. Craig*, 6 ib. 444; *Turner v. Corney*, 5 ib. 515.

(*c*) *Adley v. The Whitstable Co.*, 17 Ves. 327. See the decree in *Stainton v. The Carron Co.* 24 Beav. 363.

(*d*) See *Lodge v. Prichard*, 3 DeG. Mac. & G. 906; *Ewart v. Williams*, 7 ib. 68.

be seen. (e) After a dissolution new books are generally \*opened; but if they relate to the accounts which have to \*993 be taken, they must be produced (f); and even if a partner not before the court, objects to their production, it is by no means clear that his objection will prevail. (g) As between partners and their representatives, material documents must be produced, though they may be privileged as between them and other persons. (h)

If a partner has books or accounts in his possession, and he will not produce them, an account may, nevertheless, be arrived at by presuming everything against him.<sup>1</sup> Consequence of non-production. Thus in a case where an account was directed at the suit of the representatives of a deceased partner against the surviving partner, and the latter would not produce the books necessary to enable the Master to take the accounts, the Master estimated the net profits at 10% per cent. on the capital employed, and the Court, on exceptions to his report, confirmed it, adding that if he had set the net profits down at 20% per cent. his report would have been equally confirmed. (i)

The Court has power to employ professional accountants to assist it in taking accounts, and the Court may Accountants. act on their report. (k)<sup>2</sup>

(e) *Toulmin v. Copland*, 3 Y. & C. Ex. 655; *Freeman v. Fairlie*, 3 Mer. 43. Liberty will be given to seal up those parts which are sworn not to relate to matters in question in the suit, *ante*, p. 962.

(f) *Hue v. Richards*, 2 Beav. 305.

(g) See *Freeman v. Fairlie*, 3 Mer. 43. But see *ante*, p. 958.

(h) See *Brown v. Perkins*, 2 Ha. 540, where the excuse of professional confidence was set up.

<sup>1</sup> See *ante* 808 and note.

(i) *Walmsey v. Walmsey*, 3 Jo. & Lat. 556; and see *Gray v. Haig*, 20 Beav. 219.

(k) See Jud. Act, 1873, § 56, 57, and Ord. xxxiii. and xl. r. 10, and 15 and 16 Vict. c. 80, § 42, and see on it, *Hill v. King*, 1 N. R. 341, L. C.; *Ford v. Tynte*, 2 DeG. J. & Sm. 127; *London, Birmingham, and Buck's Rail. Co.* 6 W.

R. 141.

<sup>2</sup> The Court has power to perform the duties ordinarily performed by its master, in stating a partnership account between the parties; and in such case, each party has the same rights before the Court in regard to the production of books, examination of interrogatories, etc., that he could have before the master. *Montanye v. Hatch*, 34 Ill. 394.

A complex and intricate account is, however, an unfit subject for examination in court, and ought always to be referred to a master to be examined by him, and reported, in order to a final decree. *Patten v. Patten*, 75 Ill. 446; S. C. 14 Am. Law Reg. N. S. 733; *Moss v. McCall*, 75 Ill. 190; *Steere v. Hoagland*, 39 Ill. 264; *Bressler v. McCune*, 56 Ill. 475; *Riner v. Tousle*, 62 Ill. 266; *Grouch v. Stenger*, 65 Ill. 481; *Dubourg v. United States*, 7 Pet. 625.

## 2 Of Injunctions.

In order to prevent a partner from acting contrary to the agreement into which he may have entered with his co-partners, or contrary to the good faith which, independently of any agreement, is to be observed by one partner towards his co-partner, it is sometimes necessary for a Court to interfere either by granting an *injunction* against the partner complained of, or by taking the affairs of the partnership out of the hands of all the partners, and entrusting them to a receiver or receiver and manager of its own appointment.<sup>1</sup>

<sup>1</sup> The general rule respecting the exercise of the jurisdiction to issue injunctions in partnership matters, and in connection with receivers, is thus stated by Mr. High (Vol. 2, §§ 1330, 1350, 1351), in his valuable work on injunctions: "Courts of equity will entertain jurisdiction to prevent by injunction members of a co-partnership from the commission of acts inconsistent with the terms of their agreement, and from violating the rights of their co-partners. The jurisdiction is founded upon well-established principles of equity, and is exercised irrespective of whether a dissolution of the partnership is sought. Thus, where several partners are engaged in trade, one of their number may be enjoined from using force to the obstruction or interruption of the trade, and from removing or displacing servants employed by the other partners, and from removing the books and papers relating to the business. And where one of the members of a firm has been temporarily insane, and on his recovery his co-partners exclude him from the management of the firm business, an injunction will be allowed to restrain them from thus excluding him from the business. So, where a partnership is formed for a term of years, to be terminated on no-

tice by either party for a given length of time, an injunction will be granted to prevent one partner from obstructing the other in the enjoyment of his partnership rights, and from any improper use of the partnership funds or effects. And the use by one partner of firm property for purposes foreign to the partnership, and in violation of the articles and without the consent of his co-partner, affords sufficient ground for an injunction. But mere temptation to dishonesty and to the abuse or improper use of partnership property, will not of itself induce a court of equity to interfere. And where all the partners save one engaged in the publication of a newspaper are also partners in a rival publication, an injunction will not be granted to restrain one of the papers from using the material of the other under a contract which has been long acted on. But an injunction is proper in such a case to prevent one of the papers from publishing any information obtained exclusively at the expense of the other, until published in the paper thus obtaining it.

"The extraordinary remedy of equity by injunction in partnership matters is frequently invoked in connection with the appointment of receivers,

These two modes of interference require to be considered separately; for they are not had recourse to indiscriminately. The appointment of a receiver, it is true, always operates as an injunction, for the Court will not suffer its officer to be interfered with by any one (l); but it by no means follows that because the Court will not take the affairs of a partnership into its own hands, it will not restrain some one or more of the partners from doing what may be complained of. (m)

although the two remedies are not necessarily or always invoked or granted at the same time. In general it may be said that when upon the dissolution of a partnership the members of the firm are unable to agree upon the manner of closing up its affairs, it is the usual practice of courts of equity, with a view to protect the rights of all parties in interest, to exclude all the partners from participating in the business of closing up the firm, and to appoint a receiver for that purpose, and in that event an injunction is proper to prevent one partner from participating in the winding up of the firm. But to warrant a receiver and an injunction in partnership cases such a state of facts must be shown by the plaintiff, as, if proved at the hearing, will entitle him to a decree for a dissolution of the firm. And in determining whether the conduct of one partner has been such as to entitle the other to a dissolution, in passing upon an application for an injunction and a receiver, the court will consider not merely the specific terms of the contract of partnership, but also the duties and obligations which are implied in every such undertaking, and if it is manifest that the conduct of the defendant partner has been so injurious to the firm and so inconsistent with his duties as a partner as to entitle plaintiff to a dissolution, a receiver and an injunction will be allowed. But although an interlocutory injunction has been granted, *ex parte*, upon a bill by one partner seeking a dissolution, it does not necessarily follow that a receiver will be appointed over the affairs of the firm,

and if the court is satisfied that such a case is not presented as to entitle plaintiff to a final dissolution, it will refuse to appoint a receiver, notwithstanding such injunction, leaving the injunction to be dissolved in due time and upon proper motion."

"The fact that the conduct of the defendant partner has been such as to destroy the mutual confidence which ought to subsist between partners, is an important element influencing the court in granting relief by injunction and a receiver in partnership cases. And when the pleadings disclose a serious and apparently irreconcilable disagreement between the partners, as to the control and disposition of their property and effects and as to their respective demands against each other, the appointing of a receiver and allowing an injunction are regarded as a provident exercise of the powers of a court of equity, sanctioned alike by authority and by the exigencies of the case. So, when it is apparent that the defendant partner has deliberately resolved to break up and ruin the firm business, and the personal relations of the partners are such that they cannot carry on business with advantage to each other, sufficient cause is presented for an injunction and a receiver."

(l) Although the appointment of a receiver operates as an injunction, the Court will often grant an injunction as well as a receiver, to mark its sense of the impropriety of the conduct of those it specially restrains: see *per V. C. Kindersley*, in *Evans v. Coventry*, 3 Drew, 82.

(m) See *Hall v. Hall*, 3 Mac. & G. 85.

1.—Against partners.<sup>1</sup>

Whatever doubt there may formerly have been upon the subject, it is clear that an injunction will not be refused simply because no dissolution of partnership is sought. Where a partner who had been suffering from temporary insan-

Injunction  
granted though  
no dissolution  
is sought.

<sup>1</sup> See *post*, *Receivers*.

An injunction at the suit of one partner will be refused where there is a mere apprehension of loss, and there does not appear any breach of contract or duty, nor any misconduct amounting to fraud, in the remaining partners. *Walker v. Trott*, 4 Edw. 38.

Where the representatives of a deceased partner had enjoined the surviving partner from selling the joint property at public sale: *Held*, that it should be dissolved, there being no charge of fraud, insolvency, or misconduct against the survivor, but a mere allegation of a refusal to account, and no proof that the account had been withheld an unreasonable time. *Shad v. Fuller*, R. M. Charl. 501.

An injunction will be retained against a partner defendant, where he may get possession of funds of the partnership before the settlement of his rights by the final decree. *Randall v. Morrell*, 17 N. J. Eq. 343.

Where articles of partnership provide that, in case of the dissolution of the partnership, by the death or withdrawal of any of the partners a general account shall be taken, and prescribe the manner in which the concern shall be settled and its assets be distributed, an injunction will not lie, at the instance of the outgoing partners, against the remaining partner, until the latter has had an opportunity of closing up the concern under the articles of partnership. *Quinlivan v. English*, 44 Mo. 46.

Where one partner, holding notes for the benefit of the firm, attempts to pawn

or pledge them for his own private debts, the court will interfere to restrain it. *Stockdale v. Ullery*, 37 Pa. St. 486.

A partner may by injunction hold his associates to the specified purposes of the partnership, while the partnership continues. *Kean v. Johnson*, 9 N. J. Eq. 401.

Equity will enjoin one of several partners, who, by the partnership contract, has undertaken to superintend and manage the business, from carrying on the same business, at the same place, in a separate establishment, for his sole benefit, even though there be no express covenant restraining him from so doing. *Marshall v. Johnson*, 33 Ga. 500.

After dissolution of a firm equity will restrain one partner from publishing the letters of another concerning the business of the firm, unless the purposes of justice, civil or criminal, require their publication. *Roberts v. McKee*, 29 Ga. 161.

Where the conditions of dissolution of a partnership were such that the retiring partner had the right to open and attend to, for his own benefit, letters thereafter addressed to the late firm, upon certain subjects of business: *Held*, that the mere fact that he opened, and answered, in his own name, and for his own benefit, two fictitious or "decoy" letters, addressed to the late firm at the instance of the plaintiff, their successor, and purporting to be upon business which the former had not the right to attend to, did not authorize the court to

ity had recovered, but was excluded by his co-partners from the management of the affairs of the partnership, the Court restored him to his position in the firm by granting an injunction restraining the other partners from preventing him from transacting the business of the partnership. (*n*)

Restoring  
excluded  
partner.

Again, in England *v. Curling* (*o*), a partnership had been entered into, for a term of years which had not expired. One of the partners insisted on a dissolution and retired from the partnership, and entered into another partnership, which assumed the name of the old firm, opened the letters addressed to it, and circulated notices of its dissolution.

Restraining  
improper acts.

England *v.*  
Curling.

But on a bill filed by the continuing partners of the old firm against their co-partner and the other members of the new firm, the Court granted an injunction restraining the retired co-partner from carrying on business with his new partners or any other persons except his old co-partners, until the expiration of the term; and restraining his new partners from carrying on business with him, or otherwise, in the name of the old firm, and from receiving or opening letters addressed to it, and from interfering with its property; and restraining the retired partner from publishing or circulating any notice of the dissolution of the old firm, before the

interfere by action and injunction. *White v. Jones*, 1 Abb. Pr. N. S. 328.

An injunction restraining interference with the complainant in the exercise of his rights as a partner of the defendants, will be dissolved on the clear averment in the answer that the partnership was dissolved by mutual consent. *Van Kuren v. Trenton, &c. Co.* 13 N. J. Eq. 302.

The principles that an injunction should not be granted unless there is danger of irreparable loss, and that a prayer for equitable relief comes too late after a judgment at law, have no application to a bill in equity for an account and settlement of a co-partnership, brought by one of the partners, who alleges that he was the lessee of the partnership property, and had paid out more than he had received; and that another partner, who held the legal title to the property, which equitably belonged to

the company, had recovered judgment in ejectment against the complainant, both for the premises and for mesne profits. *Wells v. Strange*, 5 Ga. 22.

In a suit seeking an equitable off-set upon an account between former partners, and an injunction to restrain a suit at law by the defendant against the complainant upon notes given in course of partnership transactions, the mere assertion of a counter-demand will not warrant the retaining of the injunction issued upon filing the bill. Some facts must be alleged, or account given whence the court can judge whether the complainant would probably be able to establish his claim. *Hewitt v. Kuhl*, 25 N. J. Eq. 24.

(*n*) *Anon. Z. v. Z.* 2 K. & J. 441.

(*o*) 8 Beav. 129. See, too, *Warder v. Stilwell*, 3 Jur. N. S. 9.

<sup>1</sup> See *ante*, 994, note.

expiration of the term for which it had been entered into. So in the subsequent case of *Hall v. Hall* (*p*), a partnership for twenty-one years, determinable on twelve months' notice by either party (*q*), was entered into by the plaintiff and the defendant: disputes arose, and the defendant wholly excluded the plaintiff from the partnership business. The plaintiff filed a bill praying that the articles might be performed, and, amongst other things, for an injunction, but not for a dissolution. An injunction was granted, restraining the defendant from applying any of the moneys and effects of the co-partnership, otherwise than in the ordinary course of business, and from obstructing or interfering with the plaintiff in the exercise or enjoyment of his rights under the partnership articles.

These authorities show that where a partnership is not determinable at will, those partners who are desirous of carrying on the business in the proper way will be protected by the Court from the unwarranted acts of a co-partner, whose only object may be, by grossly misconducting himself, to force the others to agree to a dissolution. (*r*)

Where the partnership is determinable at will, there is, it is said, more difficulty in interfering if a dissolution is not sought; for, supposing the Court to interfere, the defendant may immediately dissolve the partnership. (*s*)

But supposing him to do so, an injunction will not necessarily be futile, inasmuch as so long as it continues in force, the defendant is rendered powerless for evil, and a notice by him to dissolve the partnership cannot, *per se*, operate as a dissolution of the injunction. In *Glassington v. Thwaites* (*t*), the plain-

*Glassington v. Thwaites.* \*996 tiff, who was one of the proprietors of the

*Morris v. Colman.* Morning Herald, obtained an injunction restraining his co-partners, who were also proprietors of the English Chronicle (in which, however, the plaintiff had no interest), from publishing in the latter paper, any information obtained at the expense of the former, until it should have been first published in the Morning Herald. So in *Morris v. Colman* (*u*), one of the proprietors of the Haymarket Theater was

(*p*) 12 Beav. 414, 20 ib. 139, and 3 Hare, 387.

Mac. & G. 79. See, also, *Blisset v.*

*Daniel*, 10 Ha. 493.

(*q*) See 20 Beav. 139.

(*r*) See, too, *Fairthorne v. Weston*, 3

(*s*) See *Peacock v. Peacock*, 16 Ves. 49; *Miles v. Thomas*, 9 Sim. 606.

(*t*) 1 Sim. & Stu. 124.

(*u*) 18 Ves. 437.

restrained from acting contrary to the articles of partnership, by writing plays for other theaters. Again, where a partner had agreed not to sell his share without first offering it to the other partners, an injunction to restrain a sale was granted. (x) It does not appear from the reports of these cases whether the partnerships were partnerships at will or not; but supposing them to have been merely partnerships at will, it is clear that the injunctions were far from valueless.

*Homfray v. Fothergill.*

In an action instituted for the purpose of having a partnership dissolved, or of having an account taken after a partnership has been dissolved, it has never been doubted that an injunction will be granted to restrain one of the partners from doing any act which will impede the winding up of the concern. For example; one partner will be restrained from carrying on the concern for any other purpose than winding up (y); from damaging the value of the good-will if it ought to be sold for the benefit of all (z); from getting in the assets if he is likely to misapply them (a); a surviving partner will be restrained from improperly ejecting the representatives of his deceased co-partner (b); and they, on the other hand, will be restrained from making any improper use of partnership property, the legal estate of which may happen to be in them. (c) So a surviving partner will be restrained from disposing of or \*getting in the partnership assets, if he has already been guilty of breaches of trust with reference to them. (d) But a surviving partner will not be restrained from continuing to carry on business in the name of himself and his deceased co-partner unless so to do is contrary to his own agreement, or the good-will is a saleable asset of the firm. (e) Again, in an action for a dissolution, a partner will be restrained from improperly interfering with or obstructing the partnership business (f); from drawing, accepting, or endorsing bills of ex-

*Injunction in actions for dissolution.*

\*997

(x) *Homfray v. Fothergill*, 1 Eq. 567.

(y) See *De Tastet v. Bordenave*, Jac. 516.

(z) *Turner v. Major*, 3 Giff. 442; *Bradbury v. Dickens*, 27 Beav. 53. In the last case the defendant was advertising the discontinuance of a partnership periodical of which he was the editor.

(a) *O'Brien v. Cooke*, Ir. L. R. 5 Eq. 51; there the plaintiff was allowed to get them in, indemnifying the defend-

ant against costs, etc.

(b) *Elliot v. Brown*, 3 Swanst. 489, n.; *Hawkins v. Hawkins*, 4 Jur. N. S. 1045.

(c) *Alder v. Fouracre*, 3 Swanst. 489.

(d) *Hartz v. Schrader*, 8 Ves. 317.

(e) See on this subject, *ante*. pp. 854, 865.

(f) *Smith v. Jeyes*, 4 Beav. 503; *Charlton v. Poulter*, 19 Ves. 148, n.

change in the partnership name for other than partnership purposes (*g*); from getting in debts owing to the firm (*h*); from withholding the partnership books (*i*), and generally on a dissolution one partner will be restrained from injuring the property of the firm. (*k*)

Injunction to protect partners from the representatives of a co-partner.

So the Court will interfere by injunction to protect partners from the interference of persons claiming the share of a late co-partner, by reason of his death, or bankruptcy, or under an execution. (*l*)

Injunction to enforce special agreements

So after a dissolution the Court constantly interferes by injunction to restrain breaches of special agreements entered into between the partners; such for example as agreements not to carry on business (*m*), not to get in debts of the firm (*n*), not to divulge a trade secret. (*o*) So, if a partner \*998 retires, and \*assigns his interest in the partnership, and in the good-will thereof, to the continuing partners, he will be restrained from recommencing or carrying on business in such a way as to lead people to suppose that he is the successor of or still connected with the old firm. (*p*)

Injunction to restrain actions on the ground of unsettled accounts.

Although injunctions to restrain actions are now abolished, it may be useful to observe that where surviving partners gave the executors of their late partner a bond for the amount of his share, the amount of which had not been ascertained, an action on the bond was stayed on its being shown that if the partnership accounts were taken it would appear that the surviving partners had already paid too much. (*q*) But an action for the balance of a settled account would not be restrained

(*g*) *Williams v. Bingley*, 2 Vern. 278, note, and Coll. Part. 233; *Jervis v. White*, 7 Ves. 412; *Hood v. Aston*, 1 Russ. 412. In the two last cases, the injunction restrained *malâ fide* indorsees for value from parting with or negotiating the securities.

(*h*) *Read v. Bowers*, 4 Bro. C. C. 441.

(*i*) *Taylor v. Davis*, 3 Beav. 388, note; *Greatrex v. Greatrex*, 1 DeG. & Sm. 692; *Charlton v. Poulter*, 19 Ves. 148, n.

(*k*) See *Marshall v. Watson*, 25 Beav. 501, where an injunction to restrain a partner from publishing the accounts of the firm, was under special circumstances refused.

(*l*) See as to assignees in bankruptcy, 1298

*Allen v. Kilbre*, 4 Madd. 464; *Fraser v. Kershaw*, 2 K. & J. 496; *Davidson v. Napier*, 1 Sim. 297; *Freeland v. Stansfeld*, 2 Sm. & G. 479. As to sheriffs, *Bevan v. Lewis*, 1 Sim. 376; *Newell v. Townsend*, 6 ib. 419. As to executors, *Phillips v. Atkinson*, 2 Bro. C. C. 272.

(*m*) *Whittaker v. Howe*, 3 Beav. 383.

(*n*) *Davis v. Amer*, 3 Drew, 64.

(*o*) *Morison v. Moat*, 9 Ha. 241.

(*p*) *Churton v. Douglas*, Johns. 174, ante, p. 855. See, also, *Hookham v. Pottage*, 8 Ch. 91.

(*q*) *Jackson v. Sedgwick*, 1 Swanst. 460. See, also, *Gold v. Canham*, 1 Ch. Ca. 311, and 2 Swanst. 325, note.

merely because there were other unsettled accounts between the parties (*r*); nor would a court of equity interfere to prevent a shareholder of a company who was a creditor of that company from executing a judgment obtained against it by him as creditor. (*s*)

Before leaving this subject, it is necessary to make a few observations on the kind of misconduct which will induce the Court to grant an injunction against one partner at the suit of another. Mere squabbles and improprieties, arising from infirmities of temper, are not considered sufficient ground for an injunction (*t*); but if one partner excludes his co-partner from his rightful interference in the management of the partnership affairs, or if he persists in acting in violation of the partnership articles on any point of importance, or so grossly misconducts himself as to render it impossible for the business to be carried on in a proper manner, the Court will interfere for the protection of the other partners. (*u*) Where, however, <sup>Injunction in case of misconduct.</sup> the partner complained of has by agreement been constituted the active managing partner, the Court will not interfere with him unless a strong case be made out against him (*x*); nor will the Court restrain a partner from acting as such, merely because if he is known so to do, the confidence placed in the firm by the public will be shaken. (*y*)

It need scarcely be observed that a partner who seeks an injunction against his co-partner must himself be able and willing to perform his own part of any agreement which he seeks to restrain his co-partner from breaking (*z*); and the plaintiff's own misconduct may be a complete bar to his application, however wrong the defendant's conduct may have been. (*a*) As stated by Lord Eldon in *Const v. Harris*, a partner who complains that his co-partners do not do their duty to him,

Partner applying for injunction must come with clean hands.

(*r*) See *Preston v. Strutton*, 1 Ans. 50, and *Rawson v. Samuel*, Cr. & Ph. 172.

(*s*) *Rheam v. Smith*, 2 Ph. 726; *Hardinge v. Webster*, 1 Dr. & Sm. 101; and see *Hammond v. Ward*, 3 Drew, 103. See, also, *ante*, p. 892.

(*t*) See *Marshall v. Colman*, 2 J. & W. 266; *Smith v. Jeyes*, 4 Beav. 503; *Lawson v. Morgan*, 1 Price, 307; *Cofton v. Horner*, 5 Price, 537; *Warder v. Stilwell*, 3 Jur. N. S. 9.

(*u*) See *ante*, p. 227. In *Anderson v. Walla.e*, 2 Moll. 540, one of several

partners who horsed a mail coach, was restrained from horsing it on the ground that he did it so badly as to imperil the business of the concern.

(*x*) See *Lawson v. Morgan*, 1 Price, 303; *Waters v. Taylor*, 15 Ves. 10.

(*y*) *Anon.* 2 K. & J. 441.

(*z*) *Smith v. Fromont*, 2 Swanst. 330.

(*a*) *Littlewood v. Caldwell*, 11 Price, 97, where an injunction was refused because the plaintiff had taken away the partnership books.

must be ready at all times, and offer to do his duty to them. (*b*)

In consequence of the liability which attaches to a person who holds himself out as a partner with others, and of the danger run by a person who is held out as a partner with others, even although it may not be with his consent, a Court will, it seems, interfere and restrain a person from holding out another as partner with him, without the authority of that other. (*c*) And if a person is, without his authority, advertised by the promoters of a company as a trustee of the company, an injunction against them will be granted. (*d*) Upon the same principle if a person's name is wrongfully placed on a company's register of shareholders, he is entitled to an injunction to restrain its continuance there. (*e*)

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\*2. *Against directors, &c.*

With respect to injunctions against companies and their directors, little remains to be added to what was said when considering the principles by which Courts are guided in interfering in matters of internal management (*f*), and in controlling majorities. (*g*) In order, however, to facilitate reference, it will be convenient to collect those cases in which an injunction has been granted or refused, although they may have been noticed in previous pages.

In relying upon the authorities here collected, it is to be borne in mind that, before the hearing or trial of a cause, the Court will not restrain the exercise of a clear legal right, unless it is satisfied that it will be compelled to do so at the hearing or trial (*h*); nor will it interfere, if it is not in the possession of all the material facts, and convinced that an immediate injunction is imperatively required. (*i*)

(*b*) *Const v. Harris*, T. & R. 524.

(*c*) See *Routh v. Webster*, 10 Beav. 561; *Bullock v. Chapman*, 2 DeG. & Sm. 211; *Troughton v. Hunter*, 18 Beav. 470. Compare *Banks v. Gibson*, 34 Beav. 566. In *Dixon v. Holden*, 7 Eq. 488, an injunction was granted to restrain the publication of a statement that the plaintiff was a member of a bankrupt firm.

(*d*) *Routh v. Webster*, 10 Beav. 561.

(*e*) See *Bullock v. Chapman*, 2 DeG.

& Sm. 211, where however, no injunction was granted. Under the Companies Act, 1862, the remedy would be under § 35.

(*f*) *Ante*, p. 895, *et seq.*

(*g*) *Ante*, p. 598 *et seq.*

(*h*) *Playfair v. Birmingham, &c. Rail. Co.* 1 R. Ca. 640.

(*i*) *Fielden v. Lancashire, etc. Rail. Co.* 2 DeG. & S. 531.

I.—*An injunction has been granted to restrain—*Injunctions  
granted.

1. The improper insertion or continuance of a person's name on a company's prospectus (*k*) or on the register of shareholders (*l*);
2. The registry of an improper transfer of shares (*m*);
3. The making of calls for illegal purposes (*n*);
4. The making of calls on a shareholder induced to become such by fraud (*o*);
- \*5. The illegal issue of shares (*p*); *e.g.*, preference shares issued pursuant to a special resolution (*q*);
6. The illegal forfeiture of shares (*r*);
7. The unfair use by a company of a creditor's name in an action against a shareholder (*s*);
8. The illegal suspension of a shareholder from his rights (*t*);
9. The illegal payment of dividends not actually declared (*u*), *e.g.*, payment of dividends out of capital or borrowed money (*x*);
10. The payment of dividends in shares (*y*);
11. The making of loans to directors (*z*);
12. The departure by a company from the objects to attain which it was formed; viz. to restrain
  - A fire and life insurance company from engaging in marine insurances (*a*);
  - A railway company from dealing extensively in the purchase and sale of coals (*b*);

(*k*) *Routh v. Webster*, 10 Beav. 561.

(*l*) *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosanquet*, 16 Beav. 84. Compare *Bullock v. Chapman*, 2 DeG. & S. 211. This is now usually done by an application to rectify the register, as to which see *ante*, p. 142.

(*m*) *Fife v. Swaby*, 16 Jur. 49.

(*n*) See as to this, *Preston v. Grand Collier Dock Co.* 11 Sim. 327, and *Hodgkinson v. National Live Stock Insur. Co.* 26 Beav. 473, and 4 DeG. & J. 422, both of which, however, were decided on demurrer. See further on this subject, *Orr v. Glasgow Rail. Co.* 3 MacQu. 799, and the other cases cited *infra*, under the next head, Nos. 2 to 6.

(*o*) *Smith v. Reese River Co.* 2 Eq. 264, and *L. R. 4 H. L. 64*; *Bloxam v. Metrop. Cab Co.* 4 N. R. 51.

(*p*) *Fraser v. Whalley*, 2 Hem. & M. 10. See *infra*, under second head, No. 8.

(*q*) *Hutton v. Scarboro' Cliff Co.* 2

*Dr. & Sm.* 514 and 521.

(*r*) *Watson v. Eales*, 23 Beav. 294; *Norman v. Mitchell*, 5 DeG. M. & G. 648; *Naylor v. South Devon Rail. Co.* 1 DeG. & Sm. 32.

(*s*) *Taylor v. Hughes*, 2 Jo. & Lat. 24, and other cases cited *ante*, p. 875.

(*t*) *Adley v. Whitstable Co.* 17 Ves. 315; 19 ib. 304; 1 Mer. 107.

(*u*) *Fawcett v. Laurie*, 1 Dr. & Sm. 192; *Carlisle v. South-Eastern Rail. Co.* 1 Mac. & G. 689; *Henry v. Great Northern Rail. Co.* 4 K. & J. 1, and 1 DeG. & J. 606, and other cases cited *ante*, p. 797.

(*x*) *Bloxam v. Metrop. Rail. Co.* 3 Ch. 337; *McDougall v. Jersey Hotel Co.* 2 Hem. & M. 528.

(*y*) *Hoole v. Great Western Rail. Co.* 3 Ch. 262.

(*z*) *Bluck v. Mallaloe*, 27 Beav. 398.

(*a*) *Natusch v. Irving*, *ante*, p. 601.

(*b*) *A.-G. v. Great Northern Rail. Co.* 1 Dr. & Sm. 154.

A railway company from guaranteeing the payment of dividends by a steam packet company (*c*);

From taking an unauthorized number of shares in another railway company (*d*);

From making a different railway from that which it was incorporated to make (*e*);

Or part only of such railway (*f*);

Or one only out of several railways which it had been formed to make (*g*);

\*1002 \*13. The transfer, by one company, of its business to another company (*h*) otherwise than under § 161 of the Companies Act, 1862 (*i*);

14. The amalgamation of two companies having similar objects (*k*);

15. A company and its directors from applying to Parliament at the expense of the company, for power to do what it was not formed to do (*l*);

16. A chartered company from surrendering its charter (*m*);

17. The publication of the contents of books and documents inspected under an order (*n*);

18. The payment out of the funds of a company of money borrowed by its promoters, to enable them to comply with the standing orders of the House of Lords (*o*);

19. Proceeding to arbitration under an *ultra vires* agreement (*p*);

20. Prosecuting a suit instituted by a stranger, but alleged to be for the benefit of the company (*q*);

21. Prosecuting proceedings for a libel on the directors. (*r*)

22. The purchase by a company of its own shares. (*s*)

(*c*) Colman *v.* Eastern Counties Rail.

Co. 10 Beav. 1.

(*d*) Salomons *v.* Laing, 12 Beav. 377.

(*e*) Bagshaw *v.* Eastern Union Rail.

Co. 7 Ha. 114, and 2 Mac. & G. 389; Simpson *v.* Denison, 10 Ha. 51.

(*f*) Cohen *v.* Wilkinson, 12 Beav. 125, and 1 Mac. & G. 481; Logan *v.* Courtown, 13 Beav. 22.

(*g*) Hodgson *v.* Powis, 12 Beav. 392 and 529, and 1 DeG. M. & G. 6.

(*h*) Charlton *v.* Newcastle and Carlisle Rail. Co. 5 Jur. N. S. 1096; Beman *v.* Rufford, 1 Sim. N. S. 550; Winch *v.* Birkenhead, &c. Rail. Co. 5 DeG. & S. 562. See, too, Salomons *v.* Laing, 12 Beav. 377; Hattersley *v.* Shelburne, 10 W. R. 801, where it was intended to obtain an act to legalize the transfer.

(*i*) See, as to this, Southall *v.* British Mutual Life Ass. Soc. 11 Eq. 65, and 6 Ch. 614.

(*k*) Kearns *v.* Leaf, 1 Hem. & M. 681; Gilbert *v.* Cooper, 10 Jur. 580.

See, also, the last note but one.

(*l*) Lyde *v.* East Bengal Rail. Co. 36 Beav. 10; Munt *v.* Shrewsbury and Chester Rail. Co. 13 Beav. 1; Simpson *v.* Denison, 10 Ha. 51; Great Western Rail. Co. *v.* Rushout, 5 DeG. & Sm. 290; Vance *v.* East Lanc. Rail. C. 3 K. & J. 50. See, also, A.-G. *v.* Norwich, 16 Sim. 225, and compare Bateman *v.* Mayor of Ashton-under-Lyne, 3 H. & N. 323.

(*m*) Ward *v.* Society of Attornies, 1 Coll. 370, as to which, see *ante*, pp. 606, 607.

(*n*) See Williams *v.* Prince of Wales Co. 23 Beav. 338.

(*o*) Spackman *v.* Lattimore, 3 Giff. 16.

(*p*) Maunsell *v.* Midland Great Western Rail. Co. 1 Hem. & M. 130.

(*q*) Kernaghan *v.* Williams, 6 Eq. 228.

(*r*) Pickering *v.* Stephenson, 14 Eq. 322.

(*s*) Hope *v.* International Financial Soc. 4 Ch. D. 327.

## II.—*An injunction has been refused to restrain—*

1. A company from commencing business on a smaller scale than contemplated by the prospectus, or before its nominal capital had been subscribed (*t*); Injunctions refused.

2. The making of calls by a company commencing business with less capital than that originally contemplated (*u*);

\*3. The making of necessary calls by directors who had been guilty of improper conduct (*x*); \*1003

4. The making of calls on some only of the members of an amalgamated society (*y*); Injunctions refused.

5. The making of calls on all the members of two amalgamated companies, to pay the debts of one of such companies (*z*);

6. Actions for calls on improperly relinquished or forfeited shares (*a*);

7. The borrowing of money by a limited company (*b*);

8. The issuing of preference shares (*c*);

9. The application of the money raised by the issue of preference shares to a purpose different from that for which it was raised (*d*);

10. The return of deposits to subscribers (*e*);

11. The payment of dividends actually declared (*f*);

12. The payment of dividends before payment of debts (*g*);

13. The payment of dividends before the completion of the company's works (*h*);

14. The continuance in office of directors appointed in the place of others removed for alleged misconduct (*i*);

15. The management of a company's affairs by directors whose conduct was complained of; no sufficient attempt having been made to control them before applying to the Court (*k*);

(*t*) *McDougall v. Jersey Hotel Co.* 2 Hem. & M. 523.

(*u*) *Norman v. Mitchell*, 19 Beav. 278, and 5 DeG. M. & G. 648.

(*x*) *Logan v. Courtown*, 13. Beav. 22.

(*y*) *Bailey v. Birkenhead, &c. Rail. Co.* 12 Beav. 433. Compare *Preston v. Grand Collier Dock Co.* 11 Sim. 327, and see No. 15, *infra*.

(*z*) *Cooper v. Shropshire Union Rail. Co.* 6 Ra. Ca. 136; S. C. 13 Jur. 443.

(*a*) *Harris v. North Devon Rail. Co.* 20 Beav. 384; *Playfair v. Bristol, &c. Rail. Co.* 1 Ra. Ca. 640.

(*b*) *Bryon v. Metropolitan Saloon Omnibus Co.* 4 Jur. N. S. 680, and on appeal, 3 DeG. & J. 123. See No. 15.

(*c*) *Edwards v. Shrewsbury, &c. Rail. Co.* 2 DeG. & Sm. 537. See under first head, No. 5.

(*d*) *Yettis v. Norfolk Rail. Co.* 3 DeG. & Sm. 293. See No. 15, *infra*.

(*e*) *Kent v. Jackson*, 14 Beav. 367, and 2 DeG. M. & G. 49.

(*f*) *Fawcett v. Laurie*, 1 Dr. & Sm. 192; the suit, however, was defective, for want of parties. See *ante*, p. 888.

(*g*) *Stevens v. South Devon Rail. Co.* 9 Ha. 326. See No. 15.

(*h*) *Browne v. Monmouthshire, &c. Rail. Co.* 13 Beav. 32. See No. 15.

(*i*) *Iderwick v. Snell*, 2 Mac. & G. 216.

(*k*) *McDougall v. Gardiner*, 1 Ch. D. 13, and 10 Ch. 607; *Carlen v. Drury*, 1 V. & B. 154; *Waters v. Taylor*, 15 Ves. 10; *Foss v. Harbottle*, 2 Ha. 461; *Mozley v. Alston*, 1 Ph. 790. This principle was acted on in the cases cited under Nos. 4, 5, 7, 8, 9, 12, 13.

16. Directors improperly appointed, from acting (*l*) ;
17. Directors from putting their own names on negotiable instruments relating to the affairs of the company (*m*) ;
18. The sailing of a ship on a voyage disapproved of (*n*) ;
- \*1004 \*19. The assignment of a company's property to trustees, upon trust, to sell and pay the company's debts (*o*) ;
20. The total abandonment by a railway company of its works, it not having funds to complete them (*p*) ;
21. The application to Parliament, otherwise than at the expense of the company, for power to enable the company to do what it was never intended it should do (*q*) , though the application is in the name and under the seal of the company (*r*) ;
22. The sealing of an agreement to make such an application (*s*) ;
23. A company from applying to a foreign legislature for increased powers (*t*) ;
24. An application to Parliament to legalize an agreement for the transfer of the business of one company to another (*u*) ;
25. A railway company empowered to purchase a canal, from exercising the powers of a canal company (*x*) ;
26. A railway company having steam ferry-boats from using them for other than ferry purposes when not wanted for those purposes (*y*) ;
27. A railway company from carrying out a traffic agreement entered into with another company (*z*) ;
28. An hotel company from temporarily letting out part of its hotel for other than hotel purposes (*a*) ;
29. A fire insurance company from paying for losses usually paid for, but not covered by its policies (*b*) ;
30. The discharge of a servant whose engagement was provided for in the company's articles of association (*c*) ;
31. The non-registry of a transfer of shares (*d*) ;
32. The voluntary winding up of a company with a view to a transfer of its business under § 161 of the Companies Act, 1862 (*e*) ;

(*l*) *Hattersley v. Shelburne*, 10 W. R. 881.

(*m*) *Bluck v. Mallaloe*, 27 Beav. 398.

(*n*) *Miles v. Thomas*, 9 Sim. 606.

(*o*) *Lord v. Governor & Co. of Copper Miners*, 2 Ph. 740.

(*p*) *Logan v. Courtown*, 13 Beav. 22.

(*q*) *Ware v. Grand Junc. Waterworks Co.* 2 R. & M. 470.

(*r*) *Ex parte Hartbridge*, 5 Ch. 671; *Great Western Rail. Co. v. Rushout*, 5 DeG. & Sm. 290. Compare *Maunsell v. Midland Great Western Rail Co.* 1 Hen. & M. 130.

(*s*) *Winch v. Birkenhead Rail. Co.* 5 DeG. & Sm. 580.

(*t*) *Bill v. Sierra Nevada Mining Co.* 1 DeG. F. & J. 177.

(*u*) *Hattersley v. Earl of Shelburne*,

10 W. R. 881.

(*x*) *Rogers v. Oxford, &c. Rail. Co.* 2 DeG. & J. 662.

(*y*) *Forrest v. Manchester, &c. Rail. Co.* 30 Beav. 40, affirmed on appeal, 4 DeG. F. & J. 126, but on a different ground.

(*z*) *Hare v. London and Northwestern Rail. Co.* 2 J. & H. 80.

(*a*) *Simpson v. Westminster Palace Hotel Co.* 2 DeG. F. & J. 141, and 8 H. L. C. 712.

(*b*) *Taunton v. Royal Insur. Co.* 2 Hem. & M. 135.

(*c*) *Mair v. Himalaya Tea Co.* 1 Eq. 411.

(*d*) *Taft v. Harrison*, 10 Ha. 489.

(*e*) *Southall v. British Mutual Life Ass. Soc.* 11 Eq. 65, and 6 Ch. 614.

\*3. *Of Receivers.*

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The object of having a receiver appointed by the Court is to place the partnership assets under the protection of the Court, and to prevent everybody, except the officer of the Court, from in any way intermeddling with them.<sup>1</sup> The object of having a manager is to have the partnership business carried on under the direction of the Court; a receiver, unless he also appointed manager, has no power to carry on the business.

Object of having a receiver.

Courts of Justice are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so, save with a view to a dissolution or final winding up of the affairs of the concern. In the well-known case of *Const v. Harris* (*f*), Lord Eldon intimated that a receiver might be appointed in a suit where a decree could be made for carrying on the concern according to some specific agreement between the parties, as well as in a suit for a dissolution and winding up; and in that very case a receiver was appointed, although no dissolution was prayed by the bill. The receiver here appointed was, however, in no sense a manager, but merely a person nominated to receive money coming in from certain quarters, and to apply it in the manner agreed upon in the partnership articles. If the appointment of a receiver does not involve the appointment of manager, *Const v. Harris* is a clear authority to show that a receiver may be obtained in an action not seeking a dissolution of the partnership; the later cases are not opposed to this. But the writer is not aware of any instance in which an action or suit has been instituted for the purpose of continuing a partnership, and in which the Court has appointed a receiver and manager; and in *Hall v. Hall* (*g*) Lord Cottenham decided that in such a suit no such

Receivers in actions not seeking a dissolution.

*Const v. Harris.*

Receiver and manager.

<sup>1</sup> Where the receiver of firm property has assets in his hands which are shown to belong to the individual partners, an order will be made that they be restored to them. *Saylor v. Mockbie*, 9 Iowa, 209.

On a bill in equity to wind up a partnership, a receiver will not be appointed

to take possession of its assets in a foreign jurisdiction. *Harvey v. Varney*, 104 Mass. 436.

(*f*) *Turn. & R.* 517. See, further, as to managers as distinguished from receivers, *Gardner v. Lond. Chat. and Dover Rail. Co.* 2 Ch. 201.

(*g*) 3 Mac. & G. 79.

appointment could be made. *Roberts v. Eberhardt* (*h*) is to the same effect. There the plaintiff and the defendants were partners in a colliery, the plaintiff being the managing partner. Disputes arose between the plaintiff and the defendant, and the former filed a bill for an account and a receiver, but did not ask for a dissolution. The Vice-Chancellor, on a motion by the plaintiff for a receiver, refused the motion on the ground that the object of the suit was to ensure a continuance of the partnership, and not to bring it to a close. As was said by Lord Eldon, the Court will not, by appointing receivers, take upon itself the management of every trade in the kingdom: nor will it take upon itself the management of *any* partnership business, save with a view to its final winding up. (*i*)<sup>1</sup>

It is not, however, necessary in order to induce the Court to interfere, that the plaintiff should in his action expressly ask for a dissolution: for the Court will entertain an application for a receiver if the object of the action is to wind up the partnership affairs, and the appointment of a receiver and manager is sought with that view. Thus, in *Sheppard v. Oxenford* (*k*), a bill was filed by the plaintiff on behalf of himself and other shareholders in the National Brazilian Mining Company against the defendant, its sole director and manager, praying for an account of moneys received and paid by the directors on behalf of the association, and of its debts, and for payment thereof, out of the assets of the company, and for a division of the profits amongst the shareholders. The bill also prayed for an injunction to restrain the defendant from selling the property, and for a receiver to get in the debts owing to the company, and all remittances made to it from abroad, and *generally to conduct the business and affairs of the association* until the accounts should be taken. No dissolution was expressly

(*h*) Kay, 148.

(*i*) See *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Harrison v. Armitage*, 4 Madd. 143; *Hall v. Hall*, 3 Mac. & G. 79; *Smith v. Jeyes*, 4 Beav. 503; *Waters v. Taylor*, 15 Ves. 10; *Oliver v. Hamilton*, 2 Anstr. 453. In *Morris v. Coleman*, 18 Ves. 438, there was a reference for the appointment of a manager.

<sup>1</sup> A receiver will be appointed only with a view to a dissolution and winding up. Receivers are not appointed to carry on and manage the business of a partnership. *Waterbury v. Express Co.* 50 Barb. 157; *S. C.* 3 Abb. Pr. N. S. 163; *Garretson v. Weaver*, 3 Edw. Ch. 385.

(*k*) 1 K. & J. 491.

asked for, but the whole object of the suit evidently was to wind up the company, and have its assets applied in liquidation of its liabilities; and on a motion by the plaintiff for an injunction and a receiver, an injunction was granted, and a receiver and manager was appointed, as prayed by the bill. (l)

\*Again, in *Evans v. Coventry* (m), the mem- \*1007 *Evans v. Coventry.*  
bers of two societies, or rather it would seem of one society, having two branches of business, viz., a loan branch, and an insurance branch, filed a bill for the purpose of having the funds of the societies made good by the defaulting directors, and of having the accounts investigated, the affairs of the societies wound up if necessary, and their assets in the meantime protected by the appointment of a manager and receiver. It was proved that some of the funds had already been made away with by the secretary; and a manager and receiver was appointed to protect what remained until the hearing of the cause, upon the ground that the plaintiffs had an interest in the funds in question, and that those funds were in danger of being lost.

It has been already remarked, that in granting or refusing an order for a receiver, the Court does not act on the same principles as when it grants or refuses an order for an injunction; it being one thing to manage the affairs of a partnership oneself, and another to prevent a person who has already misconducted himself from interfering further with the partnership concerns. (n) Another reason for drawing a distinction between an injunction and a receiver is, that whilst an injunction excludes only the person against whom it is granted, the appointment of a receiver excludes *all* the partners from taking part in the management of the concern. It, therefore, does not follow that because the Court will grant an injunction, it will also appoint a receiver; nor that because it refuses to appoint a receiver, it will also decline to interfere by injunction. (o)

(l) A receiver and manager was appointed in this country, and the defendant, who had gone to the Brazils after the bill had been filed, was appointed receiver and manager out there.

(m) 5 DeG. M. & G. 911, reversing S. C. 3 Drew. 75. It does not appear very distinctly what the manager, as distinguished from the receiver, was expected

to do. The Vice-Chancellor refused the motion merely upon the ground that he could not take upon himself the management of such societies, even until the hearing of the cause. The Court of Appeal did not allude to this.

(n) See *Hall v. Hall*, 3 Mac. & G. 85.

(o) Although an injunction was granted, a receiver was refused, in *Read*

In considering the right to the appointment of a receiver

\*1008 \*in actions for a dissolution or winding up, it is necessary to distinguish cases in which there is a contest between partners, or late partners, from those in which the contest is between partners, or late partners on the one side, and non-partners on the other.

Right to a receiver.

Where one partner seeks to have a receiver appointed against his co-partners, the first thing to ascertain is, whether the partnership between them is still subsisting or has been already dissolved; for if it is still subsisting no receiver will be appointed unless some special grounds for the appointment can be shown (*p*), or unless it is plain that a decree for a dissolution will be made (*q*); whilst if the partnership is already dissolved, the Court usually appoints a receiver, almost as a matter of course. (*r*)<sup>1</sup> In the case supposed, the common property has to be applied in paying the partnership debts, and has to be divided amongst the partners; and each partner has as much right as the others to wind up the partnership affairs. Their position is, therefore, essentially different from that of mere co-owners, between whom Courts decline to interfere by appointing a receiver, except under special circumstances. (*s*)

1. As between partners.

After a dissolution.

*v. Bowers*, 4 Bro. C. C. 441; *Hartz v. Schrader*, 8 Ves. 317; *Hall v. Hall*, 12 Beav. 414, and 3 Mac. & G. 79.

(*p*) See *infra*, p. 1010.

(*q*) *Goodman v. Whitcomb*, 1 Jac. & W. 592.

(*r*) See the last note, and *Thomson v. Anderson*, 9 Eq. 533; *Sargant v. Read*, 1 Ch. D. 600, where both plaintiff and defendant applied for a receiver. But see *per Lord Eldon* in *Harding v. Glover*, 18 Ves. 281, in which he disavowed the principle that a dissolution was a sufficient ground for a receiver.

<sup>1</sup> When a partnership is dissolved by decree, the Court will appoint a receiver, upon a disagreement between partners, in the course of the winding up; and the same rule must apply, when a dissolution has taken place by consent or otherwise, and a serious disagreement arises afterwards, *Richards v. Baurman*, 65 N.C. 162.

Where the pleadings showed that the

parties to a bill in equity were co-partners equally interested in the property and business of the firm, and by the articles no time was limited for the continuance of the partnership, and the bill alleged that it was dissolved by consent on Dec. 31, 1862, which was denied by the answer; but it appeared that a dissolution was then contemplated and imminent, and that there was a serious and irreconcilable disagreement between the parties both as to the control and disposition of their property and effects, and their respective claims and demands against each other: *Held*, that the action of the circuit court in continuing an injunction granted by it, and appointing receivers, was a provident exercise of equity power, sanctioned by the authorities, and demanded by the exigencies of the case. *Whitman v. Robinson*, 21 Md. 30.

(*s*) See *ante*, p. 63 *et seq.*

When the contest as to a receiver arises between a partner on the one hand, and the executors, administrators, or assigns of a late co-partner on the other, the first thing to be considered is whether the person sought to be excluded from interference is a partner or not. For whilst the Court is reluctant to exclude a partner from the management of the partnership affairs, it will readily interfere to prevent other persons from intermeddling therewith. The reason given for this is, that each partner is at the outset trusted by his co-partners, and has confidence reposed by them in him; and until it can be shown that he ought not to be allowed to take part any longer in the management of the partnership affairs, the \*Court will not interfere with him. But this reasoning has \*1009 no application to persons who acquire an interest in the partnership assets by events over which the partners have no control, *e. g.*, the death or bankruptcy of one of the members of the firm. Whilst, therefore, even in an action for a dissolution, or winding up, a receiver will not be granted against a member of the firm at the instance of the executors, administrators, or assigns of a late partner, unless some special grounds for the interference of the Court can be established (*t*);<sup>1</sup> it is a matter of course to appoint a receiver where all the partners are dead, and an action is pending between their representatives (*u*); or where such appointment is sought by a partner against the representatives of his late co-partner. (*x*) *Fraser v. Kershaw* (*y*) is a good illustration of this doctrine. There one partner had become bankrupt; the share of the other partner had been taken in execution under a *fi. fa.* for a separate debt, and had been assigned to his creditor by the sheriff. The creditor, as the assignee from the sheriff of all the share and interest of the non-bankrupt partner, claimed the right of winding up the affairs of the partnership, and to exclude the assignees of the bankrupt partner from interfering. But on a bill filed by them against the judgment creditor, the Court granted an injunction, and appointed a receiver, holding

2. As between partners and non-partners.

*Frazer v. Kershaw.*

(*t*) *Collins v. Young*, 1 Macqueen, 385, and see *Harding v. Glover*, 18 Ves. 281; *Kershaw v. Matthews*, 2 Russ. 62; *Kennedy v. Lee*, 3 Mer. 448; *Lawson v. Morgan*, 1 Price, 303. For similar reasons the Court of Probate will not appoint a receiver *pendente lite* against a surviving partner unless under very

special circumstances. *Horrell v. Witts*, L. R. 1 Pr. & Div. 103.

<sup>1</sup> See *post*, 1011, note.

(*u*) *Phillips v. Atkinson*, 2 Bro. C. C. 272.

(*x*) *Freeland v. Stansfeld*, 2 Sm. & G. 479.

(*y*) 2 K. & J. 496.

that the right of the non-bankrupt partner to wind up the affairs of the partnership was personal to himself, and was incapable of transfer, and did not, therefore, pass with his share and interest in the partnership assets. (z)<sup>2</sup>

In those cases in which special grounds for the appointment of a receiver must be shown; it follows that in a firm of several members there is more difficulty in obtaining a receiver \*than in a firm of two.

For the appointment of a receiver, operating in fact as an injunction against *all* the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by an injunction than by a receiver. (a)

Before the Judicature acts it was not the practice to appoint a receiver at the instance of a defendant before decree. (b) If he desired to apply for a receiver before decree, he had to file a cross-bill. But this is now unnecessary. (c)

The grounds on which the Court is usually asked to appoint a receiver before dissolution, are either because, by agreement the partners have divested themselves more or less of their right to wind up the affairs of the concern; or because, by misconduct, the right of personal intervention has been forfeited, and the partnership funds are in danger of being lost.

As an illustration of an appointment of a receiver, grounded on an express agreement, reference may be made to *Davis v. Amer.* (d) There the plaintiff and the defendant, on dissolving partnership, appointed a stranger to get in the assets of the firm, and agreed not to interfere with him. After this agreement had been partially acted on, one

(z) See, too, *Candler v. Candler*, Jac. 225, where a receiver was granted against the assignee of partnership debts.

<sup>2</sup> Where, by an agreement between the partners and a third party, one of the partners assigns his interest to the third party, who by the agreement is to act with the other partner in settling the affairs of the firm, such assignee is entitled to an injunction and receiver to settle the affairs, in the same way as the retiring partner would have been had he

not made the assignment. *Van Rensselaer v. Emery*, 9 How. Pr. 135. See, also, *Kirby v. Ingersoll*, 1 Doug. 477.

(a) See *Hall v. Hall*, 3 Mac. & G. 79.

(b) *Rôbinson v. Hadley*, 11 Beav. 614.

(c) See Ord. xix., r. 3, and lii. r. 4. *Sargant v. Read*, 1 Ch. D. 600.

(d) 3 Drew. 64. See, too, *Turner v. Major*, 3 Giff. 442, a somewhat similar case. No receiver, however, appears to have been appointed. An injunction was sufficient.

of the partners died, and disputes arising between the executors of the deceased partner and the surviving partner, the latter proceeded to get in the debts of the firm, in violation of the agreement. On a bill filed by the executors of the deceased partner for an account, and for an injunction and a receiver, the Court, on motion, appointed a receiver, but declined to grant an express injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary. (*e*)<sup>1</sup>

With respect to misconduct, the observations which have been already made on this head when speaking of injunctions, \*might be here repeated. (*f*) If \*1011 Misconduct. the partnership is not yet dissolved (*g*), there must be something more than a partnership squabble;<sup>1</sup> the due winding up of the affairs of the concern must be endangered to induce the Court to appoint a receiver of its assets; and non-co-operation of one partner, whereby the whole responsibility of management is thrown on his co-partner, is not sufficient. (*h*)

Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted, as, for example, if one partner colludes with the debtors of the firm, <sup>Receiver appointed.</sup> and allows them to delay paying their debts (*i*); or carries on trade on his own account with the partnership property (*k*); or, the partnership property being abroad, runs off in order to do what he likes with it there (*l*); or, if a surviving partner insists on carrying on the business, and employing therein the assets of his deceased part-

(*e*) See *ante*, p. 994, note (*l*).

<sup>1</sup>Where two general partners, A and B, sign an agreement at the dissolution of the firm, that B shall settle the affairs of the firm, and use the firm's name in so doing, and the agreement is published, and was intended for publication: this is evidence of an agreement that B alone was authorized to settle the affairs of the partnership. An assignment was made by B for the benefit of the firm's creditors after this arrangement, and while A was present, but without his knowledge. A applied thereupon for a receiver, but alleged no fraud or bad conduct in the assignee, and the answer to his bill insisting strongly on the solvency of the firm:

*Held*, that the application should be denied, and that the court would not interfere with the agreement of the partners. *Hayes v. Heyer*, 4 Sandf. Ch. 485.

(*f*) *Ante*, p. 998<sup>1</sup>.

(*g*) See *ante*, p. 1008, as to dissolved partnerships.

<sup>1</sup> See *Loomis v. McKenzie*, 31 Iowa, 425.

(*h*) See *Roberts v. Eberhardt*, Kay, 148, and *Rowe v. Wood*, 2 J. & W. 556, where one partner declined to advance more money to work a mine.

(*i*) *Eastwick v. Coningsby*, 1 Vern. 118.

(*k*) *Harding v. Glover*, 18 Ves. 281.

(*l*) *Sheppard v. Oxenford*, 1 K. & J. 491.

ner (*m*); or if there is such mismanagement as endangers the whole concern (*n*); or if the persons having the control of the partnership assets have already made away with some of them (*o*) in all these cases the Court will interfere by appointing a receiver. (*p*)<sup>2</sup>

(*m*) *Madgwick v. Wimble*, 6 Beav. 495.

(*n*) See *De Tastet v. Bordieu*, cited in a note in 2 Bro. C. C. 272; but see *Const v. Harris*, T. & R. 524.

(*o*) *Evans v. Coventry*, 5 DeG. M. & G. 911.

(*p*) See *Smith v. Jeyes*, 4 Beav. 503.

<sup>2</sup> A receiver may be appointed to take charge of partnership property, where the firm or one partner has become insolvent, and a partner, or in the latter case the insolvent partner, is wasting the property, or threatens to make an improper application of it. *Williamson v. Wilson*, 1 Bland, 418; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Birdall v. Colie*, 11 N. J. Eq. 63; *Willson v. Fisher*, 12 N. J. Eq. 71; *Cox v. Peters*, 13 N. J. Eq. 39; *Deveau v. Fowler*, 2 Paige, 400. *Evans v. Evans*, 9 id. 178; *Jacquiu v. Buisson*, 11 How. Pr. 385; *Geortner v. Trustees*, etc. 2 Barb. 625; *Ellis v. Commander*, 1 Strobh. Eq. 188; *Phillips v. Trezevant*, 67 N. C. 370; *Boyce v. Burchar*, 21 Ga. 74.

A partner having possession of all the partnership effects, has no ground for an application for the appointment of a receiver of the partnership property, he having full power to dispose of it. *Smith v. Lowe*, 1 Edw. 33.

A partnership was entered into for a special purpose, to wit, the delivery of 40,000 feet of plank stocks at a certain place. Subsequently, the partnership was dissolved, the defendant agreeing to pay the plaintiff for his interest in the timber, at certain rates specified in the contract of dissolution. A bill was then filed to set aside this contract of dissolution, on the ground of fraud, and praying for an injunction and the appointment of a receiver. Upon the mo-

tion to dissolve the injunction: *Held*, that in case where a partnership still subsists to authorize either party to apply for an injunction and the appointment of a receiver, he must be prepared to show a case of great abuse or strong misconduct. *O'Bryan v. Gibbons*, 2 Md. Ch. 9.

A bill alleging substantially that the complainant had bought the interest of H. in the newspaper publishing firm of B. & H.; that B. had collected debts due the firm and was wasting the proceeds; that owing to personal and political differences, etc., irreparable mischief would be done, if B. retained the management, etc., sets forth just grounds for an injunction and the appointment of a receiver. The legal effect of the sale was, *ipso facto*, a dissolution of the partnership between B. & H. *Ballard v. Callison*, 4 W. Va. 326.

Where, upon the dissolution of a partnership, its members form new firms, under an agreement to apply the partnership assets in their hands to the payment of the debts of the old partnership, and one of the firms converts to their own use, or misappropriates such assets, or their conduct induces the conclusion that they have been or are likely to be untrue to the trust so reposed in them, the court will take the partnership assets out of their hands and place them in those of a receiver. But in such case there must be evidence of bad faith on the part of such firm, before the court will appoint a receiver; mere loss of confidence in them is not sufficient. *Coddington v. Tappan*, 26 N. J. Eq. 141.

A receiver appointed to take possession of the property of a husband who has absconded with a paramour, has

Again, the reluctance of the Court in appointing a receiver against a partner, being based on the confidence originally reposed in him, that reluctance disappears if it can be shown that such confidence was originally misplaced. There-

Effect of  
fraud by a  
partner.

no right to dispossess the other partner of the firm, of which the husband was a member, of the partnership property, in the absence of any averments of waste and fraud committed, or about to be committed by such partner, to the loss of the absconding member or his legal representatives. *Hamill v. Hamill*, 27 Md. 679.

If a surviving partner mixes the firm goods and their proceeds with his own, and keeps no accounts whereby they may be distinguished, the administrator may have a receiver, unless the survivor will give security. *Jennings v. Chandler*, 10 Wis. 21.

Where it appeared that a co-partnership was insolvent, and that the complainants, who were members, were excluded from their full share in the management of the concern, and that the respondent, who was the acting partner, neglected to keep proper books of account, and to keep them open for the inspection of the complainants, who were refused access to them, the court, on motion, appointed a receiver before answer and final decree, and, on final hearing, decreed a dissolution. *Gowan v. Jeffries*, 2 Ashm. 296.

Where a partner complainant does not show by his bill that the partner defendant is disposing of the effects of the firm in opposition to his expressed wishes or views, or that by himself, agent, or attorney, he has proposed to take part in the collection and application of these effects, and has been prevented by the defendant, or that the defendant has offered any opposition to him, and the answer denies that the defendant is proceeding against the rights or contrary to the interests of the com-

plainant, or that the latter has made any demand upon him for any of the property of the firm or his individual property, a court of equity will not appoint a receiver to wind up the business. *Terrell v. Goddard*, 18 Ga. 664.

The bill stated that the plaintiff agreed with A to form a partnership in manufacturing, and that, after the partnership had continued several years, the said A excluded him from taking any part in the business, and refused to give him any information as to the sales and collections, etc. and prayed a dissolution and the appointment of a receiver, the bill not charging that the plaintiff was unable to respond. The answer denied the exclusion; stated that the parties had recently had a settlement, when the plaintiff acknowledged he was indebted to the defendant to the amount of \$609.92 over and above \$400, secured by a mortgage; and that the plaintiff's share of the net profits since the settlement was not sufficient to pay said note. The defendant gave an account of his sales and collections, stated that he always had been and now was ready to account, and denied any design to act unfairly: *Held*, that the plaintiff was not entitled to a receiver. *Parkhurst v. Muir*, 7 N. J. Eq. 307.

Under Gen. St. c. 55, § 8, a special partner is liable, in case the assets of the partnership are insufficient to pay the debts, only for the amount withdrawn by him; and he cannot maintain a bill in equity against his general partner for the appointment of a receiver if the bill does not allege that the assets of the partnership are insufficient to pay the debts, or that the conduct of the general

fore, where a defendant, by false and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterwards filed a bill, praying that the partnership might be declared void, and for a receiver, the Court on motion ordered that a receiver should be appointed. (*g*)

\*1012 \*Moreover, even although there be no misconduct jeopardizing the partnership assets, the Court will appoint a receiver if the defendant wrongfully excludes his co-partner from the management of the partnership affairs. (*r*)<sup>1</sup> This doctrine is acted on where the defendant contends that the plaintiff is not a partner (*s*), or that he has no interest in the partnership assets. (*t*)

Where a partnership is alleged on the one side and denied on the other, and a motion is made for a receiver, the Court usually declines to appoint a receiver until that question is determined. (*u*)<sup>2</sup>

partner in settling the affairs of the partnership is such that there is danger of insolvency. *Snyder v. Leland*, 127 Mass. 291.

Where the security of an administrator of a deceased partner who purchased the firm assets, and bound himself to pay the firm debts, and who has died leaving firm debts unpaid and firm assets, is not sufficient; the Court may appoint a receiver to receive from said administrator the partnership assets in his hands, and to proceed to collect the same. *Shackleford v. Shackleford*, 32 Grat. 481.

(*g*) See *Ex parte Broome*, 1 Rose. 69.

(*r*) See *Wilson v. Greenwood*, 1 Swanst. 481; and *Goodman v. Whitcomb*, 1 J. & W. 589.

<sup>1</sup>See *ante*, 1011, note; *Gowan v. Jeffries*, 2 Ashm. 296; *Wolbert v. Harris*, 7 N. J. Eq. 605. See, however, *Petit v. Chevelier*, 13 N. J. Eq. 181.

(*s*) *Peacock v. Peacock*, 16 Ves. 49; *Blakeney v. Dufaur*, 15 Beav. 40.

(*t*) *Wilson v. Greenwood*, 1 Swanst. 471, where the plaintiffs were the assignees of a bankrupt partner. See,

too, *Clegg v. Fishwick*, 1 Mac. & G. 294, where the plaintiff was the administratrix of a deceased partner.

(*u*) *Peacock v. Peacock*, 16 Ves. 49; *Chapman v. Beach*, 1 J. & W. 594; *Fairburn v. Pearson*, 2 Mac. & G. 144. See *Rock v. Mathews*, 2 DeG. & Sm. 227, as to the conclusiveness, upon a motion for a receiver, of an answer denying the partnership alleged by the bill.

<sup>2</sup>See *Baxter v. Buchanan*, 3 Brewst. 435; *Goulding v. Bain*, 4 Sandf. 716; *Williamson v. Munroe*, 3 Cal. 383.

In an action for the settlement of partnership affairs, it is proper for the Court, upon a positive denial of the partnership, and upon its being made to appear that a very small proportion, if any, of the capital was contributed by the plaintiff, and that by the injunction and receivership a large and flourishing business will be arrested and perhaps ruined, to rescind the order for injunction and receivership granted in the first instance, upon the defendants' giving adequate security to pay the plaintiff any sum that may be found due to him on final settlement. *Popper v. Schieder*,

Some difficulty occurs where the defendant relies on illegality as a defense to the action against him. If the illegality is established, the Court cannot, it is conceived, interfere. But if a receiver is moved for before the hearing of the cause, and the court is not perfectly satisfied that no relief can ultimately be given, it will appoint a receiver to protect the property *pendente lite*, and the character of the defense will go far to remove any scruples the Court might otherwise have in interfering. Thus, in *Hale v. Hale* (x), the plaintiff and the defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution, and the defendant then denied the plaintiff's right to any account or relief whatever, on the ground that the partnership was illegal. Having thus set the plaintiff at defiance, and claimed the whole property himself, Lord Langdale, on that ground alone, appointed a receiver and manager, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of.

Illegality of  
partnership.

*Hale v. Hale.*

\*In mining partnerships a receiver will be appointed or refused upon the same principles as in other partnerships. Accordingly, if no dissolution or winding up is sought, a receiver and manager will not be appointed (y); but with a view to a dissolution or winding up a receiver and manager will be appointed, if there are any such grounds for the appointment as are sufficient in other cases (z); or if the partners cannot agree as to the proper mode of working the mines until they are

Receivers of  
mines.

7 Abb. Pr. N. S. 56; 38 How. Pr. 34. See, also, *Dunham v. Jarvis*, 8 Barb. 88.

An allegation in a bill in equity, that one defendant claims to have been in partnership with a party deceased, that the other defendant, the administratrix of said deceased, denies such partnership, and that the complainant himself is ignorant of the state of the case, is not "an averment of partnership" sufficient to authorize the issuing of orders for an injunction and the appointment of a receiver. *Guyton v. Flack*, 7 Md. 398.

An unexecuted agreement of partner-

ship will not entitle one of the parties to the appointment of a receiver to wind up the affairs of the concern. *Hobart v. Ballard*, 31 Iowa 521.

(x) 4 Beav. 369. See, too, *Sheppard v. Oxenford*, 1 K. & J. 491, where a receiver was appointed although the legality of the partnership was denied.

(y) *Roberts v. Eberhardt*, Kay, 148; and see *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302, noticed below.

(z) *Sheppard v. Oxenford*, 1 K. & J. 491, where there was no prayer for a dissolution.

Rowe v. Wood. sold. (a) In Rowe v. Wood (b), indeed, a receiver was refused, although one of the partners excluded the other from interfering with the mine; but this was a peculiar case, for the partner complained of was not only a partner, but also a mortgagee in possession, and his mortgage debt was still unsatisfied. Again, in Norway v. Rowe (c), although the plaintiff was excluded, a receiver was refused on the ground of his laches, he having been excluded for some time, and having taken no steps to assert his rights until the mine proved profitable. (d)

In Rowlands v. Evans, and Williams v. Rowlands (e), it was held that a manager could not be appointed to carry on a mine for the benefit of a lunatic partner. The Court ordered a sale and appointed an interim manager only.

If the Court, on being applied to for the appointment of a receiver, thinks that a proper case for such appointment is made, and the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the Court generally appoints him receiver and manager without salary. (f) <sup>1</sup> It is usual, however, to \*1014 \*require him to give security duly to manage the part-

(a) Jefferys v. Smith, 1 J. & W. 298; Lees v. Jones, 3 Jur. N. S. 954. In this last case will be found a discussion as to what ought to be done if the mine is held on a lease, and cannot be sold without the lessor's consent, which is refused.

(b) 2 J. & W. 553.

(c) 19 Ves. 159.

(d) See further on this matter, ante, p. 902 et seq.

(e) 30 Beav. 302.

(f) This was done in Wilson v. Greenwood, 1 Swanst. 471; Blakeney v. Dufaur, 15 Beav. 40. See Sargant v. Read, 1 Ch. D. 600, where one of the plaintiffs, being senior partner, had liberty to propose himself, although it was urged that he would thereby obtain an unfair advantage as regarded the good will.

<sup>1</sup> A partner, on dissolution of the partnership, appointed agent and receiver, although he have an interest, is

only trustee for the other partners. Honore v. Colmesnil, 1 J. J. Marsh. 506.

A partner cannot under any plea personal to himself, retain moneys collected by him as a receiver appointed by the court pending a suit for a partnership settlement. To retain such funds is a flagrant breach of trust, and the court may compel their immediate production. Gridley v. Conner, 2 La. Ann. 87.

The compensation of a receiver appointed to wind up the affairs of a dissolved partnership is to be limited to such an amount as will afford a reasonable compensation for the services required and rendered, to a person of ordinary standing and ability, competent for such services; and is not to be based upon the usages or rates of profits which prevail in any branch of business, nor upon the special qualifications or standing of the person appointed. Grant v. Bryant, 101 Mass. 567.

nership affairs, and to account for money received by him. (*g*) In other cases the appointment of a receiver is referred by the judge to his chief clerk, and leave is frequently given for each partner to propose himself. A partner who is appointed receiver becomes the officer of the Court and must act and be respected accordingly.

The order appointing a receiver usually directs the partners to deliver up to him all the effects of the partnership, and all securities in their hands, for the outstanding person-<sup>Order appointing receiver.</sup> al estate, together with all books and papers relating thereto. The receiver is directed to get in the debts of the firm, and he is, if necessary, empowered to bring actions with the approbation of the judge; he is directed to pay the partnership debts, and to pass his accounts, and to pay balances in his hands into court. (*h*)

With respect to the partnership books and papers, an order for their delivery will not be made if there is no necessity for it, or if it would occasion inconvenience.<sup>1</sup> For example, in *Dacie v. John* (*i*), the Court declined to order a solicitor, who was the managing partner of a firm, to deliver up its books and documents to the receiver; for the receiver had free access to them all, and nothing more was considered necessary.

A receiver is an officer of the Court, and any interference with him, or with property under his protection, amounts to a contempt of Court, and is punishable accordingly. (*k*)<sup>Interfering with receiver.</sup>

(*g*) See note (*f*), previous page.

(*h*) See forms of order in 2 Seton on Decrees, 1002, ed. 3; *Wilson v. Greenwood*, 1 Swanst. 484; *Whitley v. Lowe*, 4 Jur. N. S. 815. The receiver here was appointed without opposition; see 4 Jur. N. S. 197, S. C.

<sup>1</sup>The books of a liquidating partnership are in the *quasi* possession of the law, and must be placed in the hands of the receiver, in all circumstances. *Succession of Andrew*, 16 La. Ann. 197.

On an application that the executors file an inventory, and give security for the due administration of the estate, a motion for an order that the executors deposit with the surrogate the books of a co-partnership composed of the deceased and one of the executors, so as to enable

the next of kin to ascertain the amount of the interest of deceased in such co-partnership, will not be granted. The surviving partner, being entitled to the custody of the books of the firm, ought not to be compelled to give them up. *Waring v. Waring*, 1 Redf. 205.

(*i*) *McClel.* 206.

(*k*) See *Lane v. Sterne*, 3 Giff. 629, where a sheriff seized partnership property in the custody of a receiver. When an order for a receiver is made, a person is sometimes immediately put into possession; but until he is actually approved as receiver by the Court, strangers to the action in which he is appointed are not guilty of contempt of court if they interfere with him. See *Defries v. Creed*, 6 N. R. 17.

\*1015 \*4. *Of the sale of partnership property under the decree of the Court.*

It has been already seen, that in the absence of a special agree-  
 Conversion of partnership property. ment to the contrary, the right of each partner (*l*) on a dissolution is to have the partnership property converted into money by a *sale* (*m*);<sup>1</sup> even although a sale may not

(*l*) A person paid by a share of profits has no right to have them ascertained by a sale. See *Rishton v. Grissell*, 5 Eq. 326.

(*m*) *Burdon v. Barkus*, 3 Giff. 412, and on appeal, 4 DeG. F. & J. 42, where a purchase by one partner at a valuation was insisted on; *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302, a case of lunacy. See, also, *Crawshay v. Collins*, 15 Ves. 227; *Crawshay v. Maule*, 1 Swanst. 495; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Hale v. Hale*, 4 Beav. 375. See *infra*, p. 1018, as to unsalable assets and pending contracts.

<sup>1</sup>See *Stevens v. Stevens*, 39 Conn. 474; *Dickinson v. Dickinson*, 29 id. 600; *Levi v. Karrich*, 8 Iowa, 150; *Sigourney v. Munn*, 7 Conn. 524. See, however, *Tomlinson v. Ward*, 2 Conn. 396.

Where, after a dissolution of a partnership one of the late partners abandoned the partnership concerns, refused to divide the stock, and made no reply to the repeated solicitations of the other partner to come to an amicable settlement of their concerns; and where it appeared further, that in this State, among merchants and traders, the customary mode of winding up the concerns of a solvent partnership, after a dissolution, is to divide the stock of goods on hand between the partners, or for one partner to purchase out the other; that there is no usage, in such cases, to sell the stock on hand at public auction; and that when this mode of sale has been resorted to, it has been generally attended with considerable sacrifice or

loss with reference to the appraised value; and where it appeared also, that the partner in whose sole possession such goods were left, in order to render them most salable, replenished the stock with new and more salable goods, and so intermingled the old and new goods that it became impracticable for him to keep a separate account of the sales of the old stock—thus to replenish old stocks being generally practiced by regular merchants, and this being the only method that can be adopted, with a prospect of making fair sales; it was *held* that these circumstances did not deliver the case from the operation of the general rule, requiring a sale as the criterion of value. *Sigourney v. Munn*, 7 Conn. 324.

A court of equity has no power to decree the sale of a partner's interest in a firm brand or trade-mark. Such an interest is too intangible; before decreeing a sale of an alleged interest of a partner, the court must be satisfied that the object or interest sought to be sold has some substantial tangible value. *Taylor v. Bemis*, 4 Biss. 406.

In an action between partners for a settlement of the co-partnership affairs, and to recover a balance claimed by the plaintiff to be due to him, a receiver will not be appointed to sell stock owned by the parties jointly, though in proportions dependent on the state of the partnership accounts, before it is judicially determined how much of the stock belongs to each party, where no insolvency is alleged, and the defendant denies the entire equity of the complaint, and

be necessary for the payment of debts. (n) This mode of ascertaining the value of the partnership effects is adopted by courts, unless some other course can be followed consistently with the agreement between the partners. And even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen, realization of

Agreements to  
avoid sale  
which cannot  
be carried out.

offers and consents that one-half of the stock may be transferred to the plaintiff, and to give security to indemnify him for any balance he may establish in his favor. *Buchanan v. Comstock*, 57 Barb. 568.

Where, in an action of settlement, the trouble and expense of collecting accounts would render them less productive than their immediate sale, or, being desperate or of little value, the delay of collection will prevent a final partition within a reasonable period, such reasons will justify their sale; but as a general rule, they should not be sold except for cause shown. *Pratt v. McHatton*, 11 La. Ann. 260.

The fact that one of several partners who has in his possession all the assets of a firm, paid two of the partners their capital invested, under the belief that on a sale of the goods there would be no loss, does not bind him to anticipate the sale of the goods in settling with the other partners when called upon by them for an account. *Derby v. Gage*, 38 Ill. 27.

No right of redemption need be reserved when property of an insolvent partnership is ordered to be sold for payment of partnership debts. *Rhodes v. Williams*, 12 Nev. 20.

Upon the petition of one of the parties, a receiver was appointed to take charge of the partnership assets of the firm of L. & Co.; and he reported to the court an offer of purchase of the partnership assets. Certain creditors united in a request that the offer should

be accepted, and, in consideration of its acceptance, and of their *pro rata* share of the dividends thereunder, they agreed and covenanted, under seal, to release the firm from all indebtedness. The offer was accepted; and, in pursuance of an order of notice by the court, B. & C. who did not sign the agreement to release, filed their claim, and received a dividend thereon:

*Held*, 1. That the fund thus derived from the sale of the partnership property being in a court of equity for distribution, all the creditors of L. & Co. had the right to claim their proportion thereof; and it was not in the power, either of the assenting creditors, or the partners themselves, or of the court, or all combined, to require creditors to execute releases as a condition upon which they should be permitted to participate in the distribution.

2. That a condition annexed by one of the partners to his assent to the sale, that the creditors should release the firm from all indebtedness, was one that he had no right to dictate.

3. That the doctrine of equitable estoppel would prevent the non-releasing creditors, after filing their claim, and receiving a dividend thereon from denying validity of the sale made by the receiver; but they were not bound by conditions to which other creditors assented, and which they had no right to impose, except upon themselves. *Loney v. Bayly*, 45 Md. 447.

(n) See *Wild v. Milne*, 26 Beav. 504.

the property by a sale is the only alternative which a court can adopt.<sup>2</sup>

Thus in *Cook v. Collingridge* (*o*), where the partners had agreed that on the expiration of the partnership the stock in trade should be divided between the partners, it was held that as this could not be literally carried into effect, there must be a sale and a division of the proceeds.

So, if on the death of a partner an option is given to a third party, *e. g.*, his son or executor, to take his share at a valuation, and this is not done, a sale will be decreed. (*p*) Again, in a case where the articles had provided

that on a dissolution by the death of a partner his share should be taken by the \*survivors at a valuation,<sup>1</sup> and they had afterwards agreed

that in the event of a dissolution by bankruptcy, the same course should be followed as in the event of a dissolution by death, it was held that this last agreement not being under the circumstances binding on the assignees, the partnership property and effects ought to be sold. (*q*)

On the other hand, if the articles of partnership can be carried out in their spirit, and if a sale is inconsistent with them, then the rule in question will not apply, as for example in those cases already noticed (*r*), in which it has been agreed that a deceased partner's share shall be ascertained by valuation, or from the last signed account.

<sup>2</sup> See *Quinlivan v. English*, 42 Mo. 362.

(*o*) *Jac.* 607, and see *Rigden v. Pierce*, 6 Madd. 353.

(*p*) See *Downs v. Collins*, 9 Ha. 418; *Kershaw v. Matthews*, 2 Russ. 62; and *Madgwick v. Wimble*, 6 Beav. 495.

<sup>1</sup> See *Quinlivan v. English*, 42 Mo. 362.

Upon a dissolution, the court cannot compel the continuing partners to take an unexpired lease and good-will of the business at a valuation. If not disposed of by consent, they must be sold, like other partnership effects. *Dougherty v. Van Nostrand*, 1 Hoffm. 68.

Plaintiff and defendants having been partners in business, and having by mutual agreement dissolved, the defendants, by a written stipulation, agreed to

pay the plaintiff for his interest in the good-will of the business, such sum as it should be decided to be reasonably worth, by arbitrators, to be appointed by the parties. Under this agreement arbitrators were appointed, who were unable to come to any decision on the question submitted to them: *Held*, that plaintiff could not maintain an action to have the value of his interest determined and paid to him, and that in the absence of bad faith on the part of defendants, the rendering of an award by the arbitrators was a condition precedent to the plaintiff's right of action. *Altman v. Altman*, 5 Daly, 436.

(*q*) *Wilson v. Greenwood*, 1 Swanst. 471.

(*r*) See *ante*, p. 847 *et seq.*

The rule as to selling partnership property is merely adopted in order that justice may be done to all parties, when no other course has been or can be agreed upon. It is not an arbitrary rule, inflexibly applied in all cases whether it is necessary or not; and although, if one partner or his representatives insist on a sale, the Court may not be able to refuse to enforce that right (*s*), still the Court is always inclined to accede to any other mode of settlement which may be fair and just between the partners. In a case where one partner had become lunatic, and a decree for a dissolution had been obtained on that ground, and an offer was made by the other partners to pay a sum of money as the lunatic's share, the Court referred it to the Master to inquire whether it would be for the benefit of the lunatic that such offer should be accepted, and on the Master reporting in the affirmative, the Court ordered that the offer should be accepted, thereby dispensing with a sale and winding up in the ordinary way. (*t*) So, if one partner is an infant, and it appears that it will be for his benefit that the whole property shall be sold to one or more of the partners who are desirous of buying it, and the other partners consent, the Court will sanction a sale accordingly. (*u*) But although it may be for the benefit of an infant or lunatic partner that his share \*should be sold, yet if the other partners insist on the sale \*1017 of the whole property, they are entitled to such a sale. (*x*)

No sale where there is an agreement to the contrary which can be acted on.

Sale not decreed although one partner was lunatic.

Co-owners of land, whether mineral or not, are entitled to a partition and not a sale; and even although they may be partners in the profits arising from the land, still if the land itself is not partnership property, one co-owner is not entitled to have it sold against the wishes of the others. (*y*) But if land or a mine is partnership property, the right of each partner is to have it sold; and a partition can only be decreed by consent. (*z*)<sup>1</sup>

Mining partnership.

(*s*) *Wild v. Milne*, 26 Beav. 504, and *Rowlands v. Evans*, 30 Beav. 302.

(*t*) *Leaf v. Coles*, 1 DeG. M. & G. 171. See, too, *Prentice v. Prentice*, 10 Ha. App. 22.

(*u*) *Crawshay v. Maule*, 1 Swanst. 530.

(*x*) *Rowlands v. Evans*, and *Williams v. Rowlands*. 30 Beav. 302.

(*y*) See *ante*, p. 63.

(*z*) *Wild v. Milne*, 26 Beav. 504; and

see *Burdon v. Barkus*, 4 DeG. F. & J. 42, and *Rowlands v. Evans*, 30 Beav. 302. As to mines not salable without the consent of the landlord, see *Lees v. Jones*, 3 Jur. N. S. 954; and as to unsalable but valuable assets, *infra*, note (*g*).

<sup>1</sup> Real estate of a partnership, after its dissolution, is to be converted into personalty by a court of equity only

The sale to which each partner has a right is a sale to the highest bidder. (a) But with a view to do as little injustice as possible, when the Court decrees a sale it will, if necessary, direct an inquiry as to the proper mode of selling (b); and whether it will be for the benefit of all parties that there should be an immediate sale, or that the concern should be carried on for the purpose only of winding up its affairs: and if the latter is the case, the Court will give any of the parties liberty to propose himself as manager until a sale. (c) In *Rowlands v. Evans* (d), part-

Mode of  
selling.

when such conversion is required for the payment of claims against the partnership which are in the nature of debt. *Shearer v. Shearer*, 98 Mass. 107.

Although, as a general rule, so far as the partners and their creditors are concerned, real estate of the firm is regarded in equity as personal property, and, in case of dissolution, is often decreed to be sold, as a proper method of ascertaining its value and making an equal distribution of the partnership effects, yet where partners have taken title to real estate as tenants in common, and all the debts due to third persons and between themselves have been discharged, and an equal distribution of the assets can be made without a sale of the real estate, such a sale need not be ordered on a dissolution, unless it appears that such an order would be most beneficial to the partners. *Pierce v. Covert*, 39 Wis. 252.

In this case, which was an action for the dissolution of a partnership, it appeared that the assets in money, notes and accounts were much more than sufficient to pay all debts, and that title to real estate of the firm had been taken by the partners in their individual names as tenants in common; that one of the partners was dead, and his personal representatives, heirs, and widow were made parties to the action; and that another of the partners had conveyed his undivided third of the real property to one G., not a member of the firm, who was made defendant. The complaint

alleged that the real estate could not be divided without great prejudice to the owners, but there was no pretense that the sale was necessary for an equal distribution of the assets: *Held*, that the Court erred in ordering G. to convey his undivided one-third of the real property to the receiver appointed in the action. *Pierce v. Covert*, *supra*.

A partnership however, for buying and selling lands is governed by the same principles as ordinary partnerships; and, after the expiration of such partnership, a court of equity will decree a sale of the land purchased, and a proper division of profit or loss, according to the terms of the partnership. *Olcott v. Wing*, 4 McLean, 15.

One partner cannot maintain a bill for a partition of partnership land, after a suit for an account of the partnership is barred by the statute of limitations without offering to account with his co-partner. *Baird v. Baird*, 1 Dev. & B. Eq. 524.

(a) No partner has a right to buy or to compel his co-partners to buy at a valuation unless there is some agreement to that effect, *Burdon v. Barkus*, 4 DeG. F. & J. 42, and other cases cited, *ante*, p. 1015, note (m).

(b) As in *Wilson v. Greenwood*, 1 Swanst. 484; *Cook v. Collingridge*, Jac. 624.

(c) *Crawshay v. Maule*, 1 Swanst. 529; *Waters v. Taylor*, 2 V. & B. 306. See, too, *Wild v. Milne*, 26 Beav. 504.

(d) *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302.

nership property was ordered to be sold, as a going concern, by a disinterested person, with liberty to all parties to bid; and an interim receiver and manager was appointed.

The Court is extremely reluctant to give parties who have the conduct of a sale liberty to bid at it;<sup>2</sup> and the conduct of a sale in an action usually belongs to the plaintiff; if, therefore, he desires to bid, some arrangement has generally to be made respecting the conduct of the sale. Other parties \*interested have seldom any difficulty in obtaining liberty \*1018 to bid. (*e*)

In selling the good-will of a going concern, the book debts and business ought to be sold in one lot, and the purchaser ought to be informed, if the facts be so, that the sellers are entitled to carry on business in competition with him. (*f*)

If one of the partners holds an appointment which is not salable, but the profits of which are by agreement to be accounted for by him to the partnership, the partner holding the appointment will be debited with its value; for that is the only mode in which, upon a dissolution, such a source of gain can be dealt with. (*g*) The same principle applies to other unsalable but valuable assets, to which one partner has no exclusive right. (*h*)

But if the object of the partnership is to carry out a certain contract which is unfinished when the partnership is dissolved, the Court will not necessarily order the benefit of it to be sold; nor order the share of a partner in it at the time of dissolution to be ascertained by valuation; but will leave the partners to complete the contract, and will postpone the ultimate account until its completion. (*i*)

Although it is not usual for the Court to direct a sale before the hearing of the cause, still, if circumstances require it, an order for a sale will be made on motion, even although the partnership has not been previously dissolved. (*k*)

<sup>2</sup> Where partnership property is sold under a decree of court for the payment of the joint debts, and one of the partners becomes purchaser, the record should show payment before confirmation. *Renfrow v. Pearce*, 68 Ill. 125.

(*e*) See, on this subject, 2 Seton on Decrees, 1184, ed. 3.

(*f*) See *Johnson v. Helleley*, 34 Beav. 63, and 2 DeG. J. & Sm. 446.

(*g*) See *Smith v. Mules*, 9 Ha. 572; *Ambler v. Bolton*, 14 Eq. 427.

(*h*) Ibid. See *ante*, note (*z*).

(*i*) See *McClean v. Kennard*, 9 Ch. 336, where the surviving partners urged that this would not be fair, as they might have to find all the capital to complete the contract.

(*k*) *Bailey v. Ford*, 13 Sim. 495; *Crawshay v. Maule*, 1 Swanst. 506, 523, 525,

\*1019 \*SECTION VII.—OTHER MISCELLANEOUS ACTIONS.

1. *Between persons who have agreed to become partners.*

If a person agrees to become a partner, and he breaks his agreement, an action for damages will lie against him; and any premium he may have agreed to pay may be recovered (*l*); and it is no defense that the defendant has discovered that the plaintiff is a person, with whom a partnership is undesirable. (*m*) So, if a member of a firm agrees to introduce a stranger, an action lies at the suit of the latter against the former for a breach of this agreement,<sup>1</sup> although it may have been made without the knowledge of the other members of the firm, and they may decline to recognize it. (*n*)

Upon the same principle, if a person has agreed to take shares in a proposed company, and to pay a deposit in respect of such shares, an action for the recovery of the deposit he has agreed to pay will clearly lie. (*o*) The persons to bring such action are those with whom the agreement sued upon was made. If, therefore, the agreement was with the members of the provisional committee, those members, and not the managing section of them, are the proper parties to sue. (*p*)

Again, where a person agrees to become a partner upon the performance of certain conditions precedent, which, without any fault of his, are not performed, he is entitled to recover back any moneys he may have subscribed for the purposes of the partnership when formed. It is upon this principle that, as was seen in a previous chapter (*q*), subscribers to an

and 529; *Wilson v. Greenwood*, 1 Swanst. 483. See, also, *Hargreaves v. Hall*, 11 Eq. 415, the order of July 22, 1869.

(*l*) *Walker v. Harris*, 1 Anst. 245; *Gale v. Leckie*, 2 Stark. 107. In *Figes v. Cutler*, 3 Stark. N. P. C. 139, it was held that an action for breach of an agreement to become a partner, could not be supported without proof of the terms of the intended partnership. See, also, *Morrow v. Saunders*, 1 Brod. & Bing. 318. But see *McNeill v. Reid*, 9

Bing. 68.

(*m*) *Andrewes v. Garstin*, 10 C. B. N. S. 444, where the defendant pleaded that since the agreement was entered into he had discovered that the plaintiff had been guilty of fraud and dishonesty towards a former partner.

<sup>1</sup> See *Byrd v. Fox*, 8 Mo. 574.

(*n*) *McNeill v. Reid*, 9 Bing. 68.

(*o*) See, for instance, *Duke v. Dive*, 1 Ex. 36; *Duke v. Forbes*, ib. 356.

(*p*) *Woolmer v. Toby*, 10 Q. B. 691.

(*q*) *Ante*, p. 117 *et seq.*

abortive \*company are held entitled to recover back their \*1020 subscriptions, if they have not assented to the application of those subscriptions to any other than the purposes of the company when duly formed. (*r*) Thus it has been held that a subscriber to a scheme for a tontine which is never in fact fairly started, is entitled to recover the whole amount of his subscription, although expenses have been incurred in attempting to start it (*s*); also, that a subscriber to a scheme for making a railway was entitled to recover his money back by an action at law if the scheme proved a failure (*t*); and that he was so entitled, although shares might have been allotted to him (*u*), and although he might have signed an agreement authorizing the application of his deposits to preliminary expenses, if he had been induced to enter into that agreement by fraud (*x*); or if, notwithstanding that agreement, the return of his deposit had been expressly guaranteed. (*y*) So it has been held that the subscriber to a cost-book mining company is entitled to recover his money back if it is clear that it cannot be formed as intended when he subscribed to it. (*z*) In the case in which this was decided the company had actually begun to work the mine, but the plaintiff had not sanctioned that proceeding, and it was no part of his bargain that he should be considered a partner in a concern, the capital of which was less than that fixed when he agreed to join it.

The persons to be sued for the recovery back of deposits paid are those who received such deposits by themselves or their agents. (*a*)

Defendants in  
such actions.

In order that the plaintiff may prove that the consideration for which he paid his money has failed, he must show what that consideration was. (*b*)

\*In the class of cases to which reference has just been \*1021 made, it is to be observed that, *ex hypothesi*, no partnership has commenced between the plaintiff and the persons whom

(*r*) See, as to this qualification, *Garwood v. Ede*, 1 Ex. 264, and cases of that class noticed, *ante*, p. 120 *et seq.*

(*s*) *Nockels v. Crosby*, 3 B. & C. 814, and *ante*, p. 118.

(*t*) *Walstab v. Spottiswoode*, 15 M. & W. 501; and *ante*, p. 118.

(*u*) *Walstab v. Spottiswoode*, 15 M. & W. 501.

(*x*) *Wontner v. Shairp*, 4 C. B. 404,

*ante*, p. 121.

(*y*) *Mowatt v. Lord Londesborough*, 3 E. & B. 307, and 4 ib. 1, *ante*, p. 122.

(*z*) *Johnson v. Goslett*, 18 C. B. 728; 3 C. B. N. S. 569.

(*a*) See *ante*, p. 122; and see *Wells v. Ross*, 7 Taunt. 403, as to the receipt of one partner being the receipt of both.

(*b*) See *ante*, pp. 117, 118.

Observations on abortive schemes. he sues for his money. The question, Can a subscriber to an abortive scheme recover his money back? is, therefore, totally different from that put by Holroyd, J., in *Nockles v. Crosby* (c), when he asked whether, if five persons *enter into partnership*, and contribute 1000*l.* each, and they afterwards find the concern a losing one, and put an end to it, any one of them can maintain an action against the others for his share? Whilst this latter question may be answered in the negative (d), the former may properly be answered in the affirmative, as, in fact, it has been in the cases already referred to.

Persons engaged in forming a company of which they are to be members are not impliedly liable to make each other compensation for their respective services in forming the company; for although such persons are not partners, they are all engaged in the prosecution of a common design; and each *prima facie*, is to be taken as looking for remuneration to what he will get if his efforts prove successful. (e) But a person who is retained by the promoters to assist them, is entitled to be paid by them for his services, although he may afterwards himself subscribe for shares in the company. (f)

However, in *Gorgier v. Morris* (g), an agreement between the promoters of a company and the plaintiff, to the effect that the plaintiff should have a large sum in free shares of the company, in consideration of his past and anticipated future services in promoting the interests of the company, was held to amount merely to a promise to make the plaintiff a present, and to be invalid for want of a consideration. The company was never formed, and no shares were ever issued.

Where a company is required by act of Parliament to apply its first funds in defraying the expenses of its formation, an action lies against it by those who have expended their money, \*time and trouble, in forming the company. But a clause in a company's deed of settlement or articles of association to the like effect does not necessarily have the same operation. (h)

Company required to pay expenses of formation.

(c) 3 B. & C. 819.

(d) See *per* Pollock, C. B., in *Garwood v. Ede*, 1 Ex. 267.

(e) See *Holmes v. Higgins*, 1 B. & C. 74; *Wilson v. Curzon*, 15 M. & W. 532; *Milburn v. Codd*, 7 B. & C. 419.

(f) *Lucas v. Beach*, 1 Man. & Gr. 417. See, too, *Caldicott v. Griffiths*, 8 Ex. 898; and *Bartnett v. Lambert*, 15 M. & W. 489.

(g) 7 C. B. N. S. 538.

(h) See *ante*, book ii, § 3, vol. 1. p.

Although the promoters of companies are not impliedly liable to each other for service rendered, nor for money expended by any of them in the prosecution of their common design; still, if they render themselves jointly liable to a third party, and, by virtue of that liability, some only of them are compelled to pay what ought, as between themselves and the others, to be paid by all, an action of contribution lies, at the suit of those who have been so compelled to pay, against the others; and even before the Judicature acts it was no objection to such an action that there were unsettled accounts which required to be taken, before what was due from each to the other could be properly ascertained. (i)

Contribution  
between them.

## 2.—*Actions between partners.*

The Judicature acts and rules have materially altered the law relating to actions between partners. Formerly no action at law could be maintained by one partner against another if it in any way involved taking a partnership account; for although the right to an account was a legal right, the old action of account, at least between partners, had long become obsolete, and courts of law had no machinery enabling them to do justice in matters of account. (k) Hence it became settled \*that actions involving accounts between partners could not be sustained. \*1023 The Judicature acts and rules have, however, abolished this rule; and the present state of the law on this subject appears to be as follows:—

396. See, also *Wyatt v. Metrop. Board of Works*, 11 C. B. N. S. 744, as to who can sue in such cases.

(i) *Boulter v. Peplow*, 9 C. B. 493; *Batard v. Hawes*, 2 E. & B. 287; *Edger v. Knapp*, 7 Jur. 583, C. P. It may be observed here, that where the promoters of a company retain a solicitor, they are all liable to be sued by him for payment of his bill, and that a delivery by him of his bill, duly signed, to any one of those liable, is a sufficient delivery to all, *Mant v. Smith*, 4 H. & N. 324; and that any one of them is entitled to tax

his bill, *Re Stephen*, 2 Ph. 562.

(k) No instance of an action of account brought by one partner against another, is known to the writer. The action of account is almost obsolete, although there have been a few instances of it in modern times between tenants in common of real property. See *Baxter v. Hozier*, 5 Bing. N. C. 288; *Sturton v. Richardson*, 13 M. & W. 17; *Beer v. Beer*, 12 C. B. 60; *Henderson v. Eason*, 17 Q. B. 701; reversing *Eason v. Henderson*, 12 ib. 986

*First as regards real property*—The equitable as well as the legal ownership must be regarded; and no partner can eject or expel his co-partners from land in which he may have the legal estate, but of which he is a trustee for the firm, nor can he maintain an action against his co-partners for coming on such land. On the other hand, they can restrain him from excluding them therefrom. (*l*) Whether the relationship of trustee and *cestuis que trust* exists, depends upon whether the property is partnership property or not, upon whether the partnership is dissolved or not, and upon whether, if dissolved, the property is a partnership asset in which all the partners are still interested.

*Secondly as regards personal property*.—Partners are tenants in common or joint tenants of the goods and chattles belonging to the firm; but one partner has no right to take possession of them and to exclude his co-partners from them; and he can, it is apprehended, be restrained from doing so. (*m*)

*Thirdly, as regards actions for money demands or damages*.—The three following rules may be taken as guides:—

1. An action for damages may be maintained by one partner against another in all those cases in which such an action might have been maintained before the Judicature acts; provided the action would not have been restrained by a court of equity.

2. Any action which would have been so restrained cannot be supported.

3. An action may be maintained by one partner against another for any money demand which before the Judicature acts could have been made the subject of a suit for an account. (*n*)

1024\* \*Practically, the important questions which will arise under the new procedure are reduced to the following:—

1. When can an action be maintained between partners without taking a general account of all the partnership dealings and transactions?

2. When will such an account be ordered without a dissolution of the firm?

The second of these questions has been already considered. (*o*) The first, which has also been alluded to (*p*), can only be answered

(*l*) As to the old law, see *infra*, the note at the end of this section, and as to injunctions in such cases, *ante*, p. 996.

(*m*) As to the old law, see the note at the end of this section.

(*n*) A transfer to the Chancery Division may become necessary in some of these cases. See *ante*, p. 876.

(*o*) *Ante*, p. 947.

(*p*) *Ibid*.

generally by saying that each case must depend upon its own circumstances, and upon whether justice can really be done without taking such an account. (*q*) But there appears to be no reason why an action should not be brought to have some disputed item in an account settled, and why a declaratory judgment should not be pronounced settling that dispute without going further, unless it should become necessary to do so.

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#### NOTE ON THE LAW AS IT STOOD BEFORE THE JUDICATURE ACTS.

Although the law relating to actions at law between partners has been completely altered, a summary of it may still be useful for reference, and is accordingly here appended.

##### *When an action would lie.*

*First*, as regards real property. In an action of ejectment a plea on equitable grounds was not allowed. (*r*)<sup>1</sup> Hence, if a firm was in the occupation of land, the legal estate in which was in one of the partners only, he could at law eject his co-partners (*s*); and if the firm had been dissolved no notice to quit was necessary before ejectment (*t*), or trespass (*u*), was brought against them. The equitable doctrine that a partnership although dissolved, subsists for the purpose of winding up its affairs afforded no defense at law to such an action. (*x*) If the legal estate was in all the \*partners, and one partner actually excluded the others, from the land \*1025 legally belonging to them all, ejectment would lie (*y*); and if one utterly destroyed the common property, an action for damages might be sustained (*z*); but

1. Ejectment and trespass by one partner against another.

(*q*) On this head the old cases referred to *infra*, p. 1027, as illustrating the 6th rule, will still be useful. See, also, *ante*, p. 947.

(*r*) *Neave v. Avery*, 16 C. B. 328.

<sup>1</sup>A and B owned real estate as partnership property, the title standing in B's name; upon dissolution B sold to A, who agreed to pay the debts; afterwards this sale and agreement was cancelled, and A reconveyed one-half to B, retaining the other half; afterwards B sold the whole to M. with notice of A's rights: *Held*, that A could enforce his title to the half, against M. at law; that the agreements between A and B divested it of its character as partnership

property, and therefore that A need not proceed in equity to have the firm affairs settled before asserting his title to his half of the land. *Brush v. Maudwell*, 14 Cal. 208.

(*s*) *Francis v. Doe*, 4 M. & W. 331; *Smith v. Howth*, 10 Ir. Com. Law Rep. 125.

(*t*) *Doe v. Bluck*, 8 C. & P. 464.

(*u*) *Benham v. Gray*, 5 C. B. 138.

(*x*) See the last case.

(*y*) See *Peaceable v. Read*, 1 East, 568; *Doe v. Horn*, 3 M. & W. 333, and 5 ib. 564.

(*z*) See *Cubitt v. Porter*, 8 B. & C. 257; *Stedman v. Smith*, 8 E. & B. 1.

for injuries not amounting to the utter exclusion by one partner of the others, an action it seems did not lie. (a)

*Secondly*, as regards personal property. If one of several joint tenants, or tenants in common, was in exclusive possession of the common property, he had a right so to continue if he could, and no action against him would lie at the suit of his co-tenant. (b) But if one tenant in common or joint tenant destroyed (c), or as it seems sold (d) the common property, he might be sued at law by his co-tenant. In the case of a sale, however, the purchaser could not be made to restore the property, for he at all events acquired the interest of the vendor, and became therefore tenant in common with the other owners, and could not be sued by them at law. (e)

If, on a dissolution of partnership, the partnership property had been divided in specie amongst the partners, each might recover what had been allotted to him, for as to that he had become sole owner (f)<sup>1</sup>; and if the dissolution and the division of the property were made by deed,

(a) But see *Martyn v. Knowllys*, 8 T. R. 146; *Stedman v. Smith*, 8 E. & B. 1.

(b) See 2 Wms. Saund. 47, o.; *Foster v. Crabbe*, 12 C. B. 136; *Holiday v. Camsell*, 1 Tr. 658; *Fennings v. Grenville*, 1 Taunt. 241.

(c) *Barnardiston v. Chapman*, cited in 4 East, 121, and Bull. N. P. 34-5; 2 Wms. Saund. 47, o.

(d) *Mayhew v. Herrick*, 7 C. B. 247; *Barton v. Williams*, 5 B. & A. 395; *Williams v. Barton*, 3 Bing. 139.

(e) *Fox v. Hanbury*, Cowp. 445, and other cases of that class.

(f) See *Jackson v. Stopherd*, 2 Cr. & M. 361; and *Wiles v. Woodward*, 5 Ex. 557.

<sup>1</sup> When on the winding up of a partnership business, the partnership effects are divided between the several partners by an actual separation thereof, so that certain specific articles are assigned to each as his individual share, either partner may maintain an action at law against the other in respect to such articles. But a mere agreement to divide affords no foundation for such an action. Until the effects are actually separated they remain joint assets; and, as neither partner has in such a case a remedy at law to specifically enforce the agreement, equity has jurisdiction to grant relief. *Hunt v. Morris*, 44 Miss. 314.

See, also, *Jenkins v. Howard*, 21 La. Ann. 597.

Plaintiff and defendant being partners in business agreed that the plaintiff should assign to the defendant an undivided third of a patent, of which he and a third partner of them both were owners—and that the defendant should pay to the plaintiff a sum of money, furnish the means necessary to develop the invention, and carry on the business thereunder as long as they should agree, the defendant to have one-third of the profits. At the beginning of the partnership, plaintiff brought to the shop of the firm machinery and materials which before belonged to him and were needed and used for the development of the invention. After some months the defendant put an end to the business and took possession of all the property on hand including what remained of the said machinery and materials. It was admitted that this property belonged to the partners in equal shares: *Held*, that the plaintiff could not maintain an action against the defendant for its value. *Remington v. Allen*, 109 Mass. 47.

Partners agreed under seal to dissolve and that one should take all the assets, pay the debts and divide the surplus, each agreeing with the other to make

each partner was precluded from denying that any division had in fact been made, or that the previously existing tenancy in common had not been determined, and each therefore was entitled to recover what the deed declared to be his. (g)

*Thirdly*, an action for damages for the breach of an express agreement entered into by one partner with another would lie, if the damages when recovered would have belonged to the plaintiff alone.<sup>2</sup> Thus where a partner retired, and he covenanted with his co-partners not to carry on business within certain limits, or they covenanted to indem-

3. Action for breach of express contract by one partner against another.

up any deficiency: *Held*, that trover would lie by the liquidating partner against the other for refusal to deliver the goods. *Bartley v. Williams*, 66 Pa. St. 329.

That one partner fraudulently converts to his own use property supplied by another for the partnership use, dissolves the partnership, or at least gives the injured party a legal right of action. *Crosby v. McDermitt*, 7 Cal. 146.

Where A, one partner of a firm, sold all the goods in the store, against the will of his co-partner B; and A and the purchaser broke open the store, and the goods were delivered to the purchaser: *Held*, that B could not maintain trespass against A and the purchaser jointly, nor against A, except for the goods actually destroyed. *Montjoys v. Holden*, Litt. Sel. Cas. 447. See, also, *Mason v. Tipton*, 4 Cal. 276.

A partner cannot maintain replevin against his co-partner for any of the partnership property. *Whitesides v. Collier*, 7 Dana, 283; *Azel v. Betz*, 2 E. D. Smith, 188. See, also, *Buckley v. Carlisle*, 2 Cal. 420.

A partner cannot arrest his co-partner upon affidavit of fraudulent removal of the partnership property. *Cary v. Williams*, 1 Duer, 667.

Where one partner holds possession of the partnership property, and refuses to let his co-partner into possession, he will, in equity, be *held* to pay to such co-partner, or his vendee, the value of the use of the property so withheld. *Adams v. Kable*, 6 B. Mon. 384.

(g) *Ibid*.

<sup>2</sup> See *Glover v. Tuck*, 24 Wend. 153;

*Terry v. Carter*, 25 Miss. 168; *Kinlock v. Hamlin*, 2 Hill, (S. C.) Ch. 19; *Fowlber v. Rhodes*, 12 Mo. 225; *Robinson v. Bullock*, 58 Ala. 618; *Whitehall v. Shickle*, 43 Mo. 538; *Wills v. Simmonds*, 15 N. Y. Supreme Ct. 189; *Morgan v. Nunes*, 54 Miss. 308; *Moritz v. Phelps*, 4 E. D. Smith, 135; *Hunt v. Reilly*, 50 Tex. 99.

A suit at law may always be maintained for a breach of partnership articles, where the business of the partnership has not been commenced, and there are no accounts in dispute between the partners. And where some of the parties have sold out their interest before the matter in controversy arose, they need not be made parties. *Vance v. Blair*, 18 Ohio, 532.

If a contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, is the individual contract of the partners who are parties to it, and if it is made by them in their own names, and not in the name of the firm, an action may be maintained thereon by one against the others, during the continuance of the partnership. *Wright v. Michie*, 6 Gratt. 354.

An action will lie for a breach of a covenant to continue a partnership for a fixed period, unless sooner dissolved in accordance with the terms of the articles of such partnership. *Bagley v. Smith*, 10 N. Y. 489; *Addams v. Tutton*, 39 Pa. St. 447.

In a suit by one member of a partnership against another for a breach of a covenant to continue a partnership for a fixed term, the loss of prospective

nify him against the debts of the firm, actions for damages occasioned by breaches

profits from the performance of the contract, is the true measure of damages, and in such case, the plaintiff's claim for profits should not be limited to the interval between the dissolution of the partnership by the act of the defendant and his subsequent entry into business. *Bagley v. Smith*, 10 N. Y. 489.

The measure of damages in an action for a breach of a partnership agreement is the value of the contract broken, according to its value, separate and independent of any former contract. *Adams v. Tutton*, 39 Pa. St. 447.

Where one partner agrees with his co-partner, who has just acquired an interest in the property used by them as a distillery, to pay a certain tax due the United States, so as to save the property from seizure and sale, and gives personal security for such payment, and afterwards pays such tax out of the partnership funds, charging himself with the amount, the other cannot, in an action at law, recover more than nominal damages until the partnership accounts are settled. *Smith v. Reddell*, 87 Ill. 165.

An express promise by one partner, out of his share of the income, to pay another partner for his personal attention to the business of the concern, may be enforced in assumpsit, although the articles of co-partnership are under seal and provide for such payment. *Paine v. Thatcher*, 25 Wend. 450.

A stipulated compensation may be recovered at law, though payable out of profits. *Robinson v. Green*, 5 Harr. 115.

Where a partnership covenant recites that A and B had entered into partnership; that A had purchased and put into the firm goods to the amount of \$2696.26; that he had received of B a negro, at \$600, in part payment of the goods; that they were to be at equal expense and profits in the goods; and that B was to account to A for one-half

of said goods, except the said negro at \$600; the agreement to account will be held to have arisen prior to the partnership transactions; and A may maintain an action of covenant against B for failing to account for the balance of one-half of the price of the goods. *Bailey v. Starke*, 6 Ark. 191.

Even where a party to a contract was held to be a partner by the terms of the contract, yet, if it contained an express covenant to pay him his losses, or the amount of his advances less his receipts, at the end of a specified time, an action at law upon the covenant may be resorted to, and a bill in equity calling for a settlement of the partnership accounts is unnecessary. *Whitehill v. Shickle*, 43 Mo. 538.

If three or more co-partners enter into mutual covenants, where they contribute severally and in different proportions to the joint stock, their covenants are several, and each partner has his several remedy for a breach. *Dunham v. Gillis*, 8 Mass. 462.

Where, by articles of association, each of the associates severally bound himself to pay a ratable proportion of all expenditures for improvements made or to be made: *Held*, that the undertaking was mutual; the covenants of the associates being made with each other, and that the liability arose on the promise by each party to the other, which could only be enforced by an action among themselves. *Troy, etc. Factory v. Corning*, 45 Barb. 231.

A promise by a continuing partner to reimburse a retiring partner, for taking up, by his individual note, a partnership note on which the latter is still liable, but which the former has at the dissolution promised to pay, will sustain an action, a demand, whether necessary or not, having been first made. *Warbritton v. Cameron*, 10 Ind. 302.

of these covenants would clearly lie. (h) So, if a partnership was entered into for

Two partners, A and B, on dissolution of the partnership, entered into an agreement, the performance of which was secured by a penalty, by which A conveyed and assigned to B all the business, effects, and debts of the firm, and B agreed to pay all the debts due by the firm. On a bill filed by B against A, alleging that A had failed to deliver to him all the notes, bonds, and effects of the concern, according to the agreement, and praying that A might be decreed to perform his part of the agreement, but not alleging fraud nor asking a rescission of the agreement: *Held*, that the remedy of B was at law, and that chancery had no jurisdiction. *Clark v. Clark*, 4 Port. 9.

Where one partner has made profits, by engaging in any other business in violation of his contract, his co-partner has his option to sue for damages for the breach of the contract, or to bring a bill in equity to compel an accounting. *Moritz v. Perbles*, 4 E. D. Smith, 135.

An action may be maintained for the breach of a promise to admit the plaintiff as a partner in an undertaking, in which the plaintiff and defendant mutually agreed to become partners, and share the profits and losses. *Byrd v. Fox*, 8 Mo. 574. See, also, *Lane v. Roche*, *Riley Ch.* 215.

When a firm has been dissolved, and one partner has assumed the entire control of the goods, an action may be brought by such a partner against another partner to whom he has sold a portion of the goods, at the other's request, and on a promise to pay him, and not the firm. *Caswell v. Cooper*, 18 Ill. 532.

Upon a sale by one partner of his

interest to the other, who agrees to pay him therefor the capital which the former had put into the original business "as soon as he can do so without inconvenience," an action at law, and not a bill in equity, is the proper remedy to recover the price; such capital stock being ascertainable without any adjustment of the losses and profits. *Wells v. Carpenter*, 65 Ill. 447.

Where one of two partners, by agreement between them, takes certain specific articles of partnership property, and agrees to pay his co-partner, for his share thereof, a definite sum, at a specified time, the co-partner may, if he chooses so to do, maintain an action to recover the amount so agreed to be paid, independent of the settlement of the partnership accounts. But this right of separate action may be waived, by consenting to a full account of the partnership matters, including the price so agreed to be paid for the goods. *Neil v. Greenleaf*, 26 Ohio St. 567.

In an action on a note given by an outgoing partner for assets, he may set up in defense an understanding that for any notes and accounts which should prove worthless there should be a rebate from the amount *pro tanto*. In such case no resort to equity is necessary in the first instance. *Bethel v. Franklin*, 57 Mo. 466.

Where one partner, not well acquainted with the affairs of the firm, purchased a portion of the partnership interest of the other partner, and gave his note therefore relying on the representations of the latter as to its value, which he subsequently ascertained to be fraudulent, and the interest so purchased was in reality worth nothing at all, the

(h) *Leighton v. Wales*, 3 M. & W. 545; *White v. Ansdell*, Tyr. & Gr. 785; *Barker v. Allan*, 5 H. & N. 61, is an instance of a successful action by a share-

holder against directors who had agreed to indemnify him against calls. See, too, *Haddon v. Ayres*, 1 E. & E. 118.

a definite time, and one partner was turned out by his co-partners before that time had expired, he could sue them for this breach by them of their \*1026 agreement, and recover damages for the injury he had sustained (*i*); so an action might be maintained for not rendering accounts and dividing profits (*k*); for a penalty stipulated to be paid in case of a breach of agreement (*l*); for rent covenanted to be paid (*m*); for not indemnifying the plaintiff against a debt (*n*); for not putting the plaintiff in funds to enable him to defray expenses as agreed. (*o*)

firm being, in fact, insolvent at the time: *Held*, that these facts constituted a good defense to an action against the purchaser upon the note, in favor of the vendor or his administrator, though the purchaser may have made no offer to rescind the contract. *Smith v. Smith*, 30 Vt. 139.

On the dissolution of a partnership, one partner assigned to his co-partners all his interest in all the firm assets, and further covenanted not to interfere with the collection of debts owing the firm. Afterwards he receipted for one of the debts so assigned, receiving a valuable consideration: *Held*, that his co-partners might maintain a suit against him for the amount of the debt. *Ross v. West*, 2 Bosw. 360.

Where a deceased partner covenanted for a consideration, to pay the debts of the firm without unnecessary delay, and without recourse on his co-partner, a failure on his part to perform the act which he had covenanted to do, gives a right of action to his co-partner, and the latter may, in such case, file his claim against the estate of the deceased partner, before he has paid any part of the partnership debts. *Hogan v. Calvert*, 21 Ala. 194.

A and B agreed in partnership articles that, "at the expiration of the partnership, each party shall draw from the establishment one thousand dollars," etc. A brought an action of covenant on this agreement against B, assigning as a breach thereof that B did not pay over the \$1000: *Held*, that the declaration was insufficient. *Ridgway v. Grant*, 17 Ill. 117.

One of two partners cannot, at law,

sue the other on his failure to perform a covenant to which they were both bound in liquidated damages by the articles of partnership; he must first apply to equity for a dissolution of the partnership. *Stone v. Fouse*, 3 Cal. 292.

One partner cannot maintain an action at law on the covenants in the articles of co-partnership to recover damages of his co-partner for neglect of the partnership business, while there is a considerable amount due from him to his co-partner, and the debts due by and to the firm, the burden of which is to be borne, and the benefit enjoyed by the partners, in certain proportions, are not all settled. *Capen v. Barrows*, 1 Gray, 376.

Where the owner of a hotel executes a lease thereof and thereafter enters into a contract of partnership in keeping the hotel with the lessee, with an agreement that the rent reserved shall be a charge upon the firm, if the latter contract is separate from the first, it does not work a surrender of the lease, but the lessor cannot sue at law to recover the rent, but must sue in equity for a partnership accounting, as the rent must be paid out of the net profits of the partnership. *Pi Pie v. Cuzas*, 47 Cal. 174, id. 180.

(*i*) See *Greenham v. Gray*, 4 Ir. Com. Law Rep. 501.

(*k*) *Owston v. Ogle*, 13 East, 538; and see *Stavers v. Curling*, 3 Bing. N. C. 355.

(*l*) *Radenhurst v. Bates*, 3 Bing. 463.

(*m*) *Bedford Brutton*, 1 Bing. N. C. 399.

(*n*) *Want v. Reece*, 1 Bing. 18.

(*o*) *Brown v. Tapscott*, 6 M. & W. 119.

*Fourthly*, if a person agreed to become a partner with others and to furnish a certain amount of capital, and he made default, they could sue him at law for damages, although he, as well as they were to have had an interest in what he undertook to furnish. (*p*)<sup>1</sup>

4. Action for not furnishing capital.

It followed from the above that if A. and B. agreed to become partners, and each agreed to furnish a certain amount of capital, and A lent B the amount B was to contribute, this loan constituted a debt for which an action by A. against B. would lie, although they may actually have become partners. (*q*)<sup>2</sup> And it also followed that, if partners agreed to con-

Loan by one partner of sum to be brought in by the other.

(*p*) *Hesketh v. Blanshard*, 4 East, 144; *Venning v. Leckie*, 13 East, 7; *Gale v. Leckie*, 2 Stark. 107. *Hesketh v. Blanshard* gave rise to much controversy (see *Stocker v. Brocklebank*, 3 Mac. & G. 265; *Rawlinson v. Clarke*, 15 M. and W. 298; *Collyer on Part.* p. 30), not indeed, with reference to the question decided, but with reference to an opinion expressed by Lord Ellenborough, that no partnership existed between Robertson and the plaintiff, except as regards third parties. Having regard to the decisions relating to partnerships in profits, it is difficult to assent to this opinion; but the case was unimpeachable as regards the point before the court, viz., the right of the plaintiff, whether partner or not with Robertson, to recover the price of the meat for which the plaintiff had been compelled to pay.

<sup>1</sup>See *Ellison v. Chapman*, 7 Blackf. 224; *Grigsby v. Nance*, 3 Ala. 347; *Scott v. Campbell*, 30 id. 728; *Truitt v. Baird*, 12 Kan. 420; *Wills v. Simmonds*, 51 How. Pr. 48; *Currier v. Webster*, 45 N. H. 226.

Where one partner fails to comply with his agreement to furnish buildings and machinery, for the purpose of carrying on the partnership business, the other partner may maintain an action of assumpsit against him for damages arising to him for such breach of contract. And, in such case, equity will not enforce a specific performance. *Wadsworth v. Manning*, 4 Md. 59.

One partner may sue another at law on a note given by the latter to the former, for the payment of a part of the capital stock. *Grigsby v. Nance*; *Scott v. Campbell*, *supra*.

Where, however, a partnership is actually formed and proceeds, to do business as such, such a case has been distinguished from a case where one refuses to become a partner according to his agreement, and it has been held that in the former case no action at law can be maintained by one of the partners against another for his misconduct as a member of the firm in refusing to furnish money to complete the business undertaken, as he had agreed to do in the formation of the partnership, whereby a great loss of profits was sustained. A final settlement must first be had, and this can only be enforced in equity. *Buckmaster v. Gowen*, 81 Ill. 153.

(*q*) *Elgie v. Webster*, 5 M. & W. 518; *Ex parte Notley*, 1 Mon. & Ayr. 46 and 3 D. & Ch. 367. See *Jestons v. Brooke*, Cowp. 793.

<sup>2</sup>A suit at law can be maintained by one partner against another, for money advanced to him to launch the partnership, or to be used in the partnership business, if the claim does not necessarily connect itself with the affairs of the whole firm, and can be ascertained without a previous examination of the partnership accounts. *Currier v. Rowe*, 46 N. H. 72; *Crater v. Binninger*, 45 N. Y. 545; *Van Ness v. Forest*, 8 Cranch, 30; *Gridley v. Dole*, 4 N. Y. 486.

tribute capital from time to time to meet expenses, as occasion might require, and one of them was compelled to pay the whole of the expenses for which all were liable, he could sue his co-partners for what they ought to have contributed, according to their agreement. (r)

*Fifthly*, one partner might maintain an action for damages in respect of a demand which had either nothing to do with the partnership business,<sup>3</sup> or, if entangled in it, was only so entangled by reason of the wrongful conduct of the defendant.<sup>4</sup> Thus one partner who had received money to the use of another might be sued for it, although he had paid it to the credit of the firm; for his business was to hand it

(r) *Brown v. Tapscott*, 6 M. & W. 119. See, also, *French v. Styring*, 2 C. B. N. S. 357.

<sup>3</sup> See *Biernan v. Biernan*, 14 Mo. 24; *Chamberlain v. Walker*, 10 Allen, 429; *Haller v. Williamowicz*, 23 Ark. 566; *Battaille v. Battaille*, 6 La. Arn. 682; *Elder v. Hood*, 38 Ill. 533; *Paine v. Moore*, 6 Ala. 129; *Seaman v. Johnson*, 46 Mo. 111.

A and B entered into partnership, A to furnish the land and buildings for the business, and B certain cash capital. To enable A to put the buildings in better repair, B also loaned him a certain sum. The partnership business was interrupted by the death of A: *Held*, that B was entitled to recover the amount of his loan from the estate of A, as a debt unconnected with the affairs of the partnership. *Biernan v. Braches*, *supra*.

Where one partner advances money for the benefit of another, to relieve him from liability upon an execution issued for debts due the firm, and takes his note therefor, the contract is a private one, and may be enforced without regard to the state of the affairs of the partnership. *Chamberlain v. Walker*, *supra*.

If a partner's individual property used in the partnership business is damaged by the other partner, his remedy therefor is at law,—not by a bill in chancery for an account of the partnership dealings. *Haller v. Williamowicz*, *supra*.

One who is clerk and also in partner-

ship in a particular business with his employer, may, where his duties as clerk and partner are distinct, sue for his salary due him in the former capacity, without resorting to a suit for the settlement of the partnership transactions. *Alexander v. Alexander*, 12 La. Ann. 588.

If one co-partner contribute funds which it was the duty of another co-partner to furnish, in furtherance of a partnership enterprise, such funds thus contributed may be recovered in an action of assumpsit, without waiting for a final adjustment of the business of the co-partnership. *Wright v. Eastman*, 44 Me. 220.

A partner may sue his co-partners upon an independent contract made by them as a firm with him before the partnership was formed between him and them. *Mullany v. Keenan*, 10 Iowa, 224.

Where a carpenter employed to work on a house belonging to a partnership in which it conducts its business, buys a partner's interest when the work is nearly finished, and finishes it afterwards, he may sue the other partner for his share of the work, it not being a partnership transaction, before claiming a settlement. *Boyd v. Brown*, 2 La. Ann. 218.

<sup>4</sup> The rule that generally one partner cannot sue the other to recover money paid into the firm, does not apply where one was induced by the other's fraud to sign the articles; the latter obtaining

over to his co-partner. (s)<sup>5</sup> So a partner who, in fraud of his co-partners, had given a note in the name of the firm for a private debt of his own, \*1027 whereby his co-partners had been compelled to pay such note, was liable them at law for the whole of what they had been compelled to pay. (t)

*Sixthly.*—One partner might sue another at law in respect of a matter which, though relating to the partnership business, was separate and distinct from all the other matters in question between the partners, and could and ought to be determined without going into the partnership accounts. (u) Thus where a partnership had been dissolved, and it had been agreed that one partner should take all the partnership property at a valuation, and it had been valued, and he had taken it at that valuation, and the values of the shares of the other partners had been ascertained, they might separately sue him at law for the amount payable to them respectively. (v)<sup>1</sup> So, if partners went through the accounts of the partnership, and a final balance was struck, and the amounts of their shares were ascertained, and the person by whom those amounts were to be paid was also ascertained, an action would lie against him in respect of each share to be paid by him. (x).<sup>2</sup> The balance, however, must have been a final balance to be

6. and for matters not involving them;

action for amount of valuation;

for balance struck;

the money not for partnership purposes, as pretended, but with intent to appropriate it to his own use. *Hale v. Wilson*, 112 Mass. 444.

The plaintiffs and the defendants purchased jointly certain real estate, which they subsequently conveyed to a petroleum company, receiving in part payment shares of the company's stock, which were distributed among the parties proportionately to their several interests in the land: *Held*, that there was not such a mutuality of interest between the parties as to make applicable the rule which precludes one partner from suing another, and therefore that the plaintiffs could maintain an action against the defendants to recover damages for fraud practiced on them in the purchase of the land. *Dart v. Walker*, 3 Daly, 136.

(s) *Smith v. Barrow*, 2 T. R. 476.

<sup>5</sup>A, B and C were partners. A, in his absence, left his private affairs in the hands of B, as his agent. On the return of A, B gave him a writing stating receipts and expenditures as agent, and acknowledging a certain sum due to A and "put into the partnership:" *Held*, that the acceptance of such writing by A did not make it necessary for

him to resort to the partnership to recover the amount due, and that B was liable individually. *Paine v. Moore*, 6 Ala. 129. See, also, *Seaman v. Johnson*, 46 Mo. 111.

(t) *Cross v. Cheshire*, 7 Ex. 43; *Osborne v. Harper*, 5 East, 225.

(u) The Court of Chancery would not restrain such actions. See *ante*, p. 998.

(v) See *Jackson v. Stopherd*, 2 Cr. & M. 361.

<sup>1</sup> See *ante*, 1025, note.

(x) *Morley v. Baker*, 3 Fos. & Fin. 146; *Moravia v. Levy*, 2 T. R. 483, note; *Foster v. Allanson*, 2 T. R. 479; *Wray v. Milestone*, 5 M. & W. 21; *Brierly v. Cripps*, 7 C. & P. 709; *Preston v. Stratton*, 1 Anst. 50; *Henley v. Sloper*, 8 B. & C. 16; *Rackstraw v. Imber*, Holt, 363; *Wells v. Wells*, 1 Ventr. 40.

<sup>2</sup>See *Gulick v. Gulick*, 14 N. J. Law, 578; *Clark v. Dibble*, 16 Wend. 601; *Robinson v. Williams*, 8 Metc. 454; *Ridgeway v. Grant*, 17 Ill. 117; *Pope v. Randolph*, 13 Ala. 214; *Wilby v. Phinney*, 15 Mass. 116; *Fanning v. Chadwick*, 3 Pick. 420; *M'Call v. Oliver*, 1 Stew. 510; *McGehee v. Dougherty*, 10 Ala. 863; *Martin v. Solomons*, 5 Harr. 344; *Wycoff v. Purnell*, 10 Iowa, 332; *Lane v. Tyler*, 49 Me. 252; *Nims v. Bigelow*, 1337

paid, and not a balance to be carried over to a fresh account in continuation of that just closed. Therefore, where one partner sued another for a debt unconnected

44 N. H. 376; *Hanks v. Baber*, 53 Ill. 292. See, also, *Wood v. Merrow*, 25 Vt. 340; *Warren v. Dickson*, 30 Ill. 363; *Byrd v. Fox*, 8 Mo. 574.

Balances struck only preparatory to a settlement, are not sufficient. Until the final settlement is had, the remedy is in equity. *Burns v. Nottingham*, 60 Ill. 531.

No express promise to pay the balance need be alleged. *Mackey v. Auer*, 15 N. Y. Sup. Ct. 180. See, also, *Ross v. Cornell*, 45 Cal. 133; *Purvines v. Champion*, 67 Ill. 459. See, however, *Killam v. Preston*, 4 Watts & Serg. 14.

A & B, partners in a house of entertainment, called on a person to make out an account current from the books, in the presence of the parties, and agreed verbally that they should settle by the balance found by him; and if they could not agree upon the balance found by him, then they should call in two other persons to adjust the matter, and the party against whom the balance should be found, should pay it to the other. One of the parties refused to abide by the agreement, but the other proceeded, called in one person and had the account stated. Upon this account he sued the other: *Held*, there could be no recovery, although proof was made that the account was correctly stated from the books. *Morrow v. Riley*, 15 Ala. 710.

The rule that when a balance is struck between partners, and a promise to pay is made, an action at law lies to recover the amount, applies where, on the dissolution of an incorporated association, a resolution was passed determining the share of the common fund which should be paid to each member, and the defendant (the treasurer) promised to pay such balance. *Kockler v. Brown*, 31 How. Pr. 235.

A partnership between the plaintiff and defendant having been dissolved, the plaintiff agreed to pay all the debts against the company; and the defendant agreed, in writing, that a certain sum was the final balance of accounts between them as partners: *Held*, that the plaintiff might, before paying the outstanding partnership debts, maintain assumpsit against the defendant to recover the sum thus agreed to be the final balance, the defendant, if compelled to pay any such debts, having his remedy on the plaintiff's agreement. *Dickinson v. Granger*, 18 Pick. 315.

Where one partner, upon the settlement of the partnership account, promises to pay the other a certain sum, provided it shall be found that the promisor has never paid such sum to a certain third party for such other partner, upon its being ascertained that the money has not been paid to such third person, the promisee may recover the same from his partner in an action of assumpsit. *Adams v. Funk*, 53 Ill. 219.

In 1859 plaintiff and defendant's intestate, each owned a bank in Wisconsin; plaintiff, the C. bank, and the other, the M. bank. They formed a co-partnership, each contributing his bank, and together they constituted a bank known as the L. bank, and each contributed some money. The partnership thus formed continued until 1861, when it was dissolved. During the time the three banks continued to do business as such, and had transactions with each other, as though no partnership existed between the owners. At the time of the dissolution the books of the banks showed that the M. bank was indebted to the C. bank \$1,000, and that the L. bank was indebted to it \$3,000. Upon dissolution, plaintiff transferred to his partners all the interest in the M. and

with the partnership, the defendant was not allowed to set off a balance found due to him on the partnership account; for it did not appear that the account which

L. banks, and his partners transferred to him all the interest in the C. bank. The partners agreed in writing that the M. and L. banks should pay plaintiff the \$3,000 due the C. bank, as soon as they conveniently could, with interest at the rate of 12 per cent.; and defendant's intestate pledged "his honor to pay the balance" as soon as it could be done without pressing the banks. In an action upon this agreement, *held*, that the indebtedness, if any, was not in favor of plaintiff against the two banks as such, but against the intestate, arising out of partnership transactions; that there was not shown to have been a final accounting between the two partners, or an express promise on the part of the intestate to pay, and that the plaintiff could not recover. The rule in New York is well settled, that one partner cannot recover at law against another, except after a final accounting, balance struck and express promise to pay. *Bloss v. Chittenden*, 2 Thomp. & C. 11.

When, by common consent, all the members of a partnership charge certain of their number with the exclusive management of the business, and with the collection and disbursement of all revenues, agreeing that the managing partners shall pay over to each of the others, separately, his share of the profits when dividends accrue, each member may sue separately, at law, for unpaid dividends, and there is no occasion for resorting to equity; but, whether the suit for dividends is in one form or the other, it must be brought in the county where the managing partners reside, as they alone are the real debtors, and the only necessary parties defendant. *Wadley v. Jones*, 55 Ga. 329.

The payment by one partner to another of a certain sum as his share, is

not equivalent to a settlement of the partnership account; nor is it evidence that the same sum has been ascertained as the share of each partner, so that assumpsit will lie by a third partner. *Beach v. Hotchkiss*, 2 Conn. 425.

After a settlement, wherein each partner waives his right to have all the partnership matters which may come to light after the dissolution adjusted in a single proceeding in equity, one may maintain an action at law against another to recover his proportion of money of the partnership in the latter's hands at the time of the settlement, which was not then accounted for, nor mentioned by him, nor entered on the books of the firm, no other assets of the firm having been discovered. *Dakin v. Graves*, 48 N. H. 45.

Where only a single item of account between partners remains unadjusted, it can be settled by an action at law. *Buckner v. Ries*, 34 Mo. 357; *Finlay v. Stewart*, 56 Penn. St. 183; *Wheeler v. Arnold*, 30 Mich. 304. See, also, *Moran v. Le Blanc*, 6 La. Ann. 113; *Dole v. Thomas*, 67 Ind. 570.

Where parties agree to engage in a single transaction, for the purpose of making profits, their agreement does not amount to a partnership, in such manner as to compel the partner seeking his share of the profits, or payment for work, and materials furnished, in excess of his proportionate share of the venture, from the other partner, to resort to an action of account render, but he may recover in assumpsit. Where the partnership, if it existed, was in a single transaction, and there were no debts due by or in favor of the firm, the plaintiff, in such a case, may recover, in the equitable action of assumpsit, that which will make him equal with his co-partner. *Wright v. Cumpsty*, 41 Pa.

had been stated was a final account, nor that the plaintiff had ever promised to pay the balance which, on taking the account, was found due to the defendant. (y) In this last case the partnership continued after the balance sued for was struck; but if a balance was struck, and was to be paid by one partner to the other, it might probably have been sued for, notwithstanding the continuance of the partnership; for, *ex hypothesi*, it was isolated and separated from the general account. (z)

Again, if one partner gave to his co-partner a bill or note which was in such a form as to bind, not the firm, but the partner who gave it, he On bill or note; might be sued by his co-partner thereon, whatever the state of the accounts between the two might be, and although the bill or note in question had reference to some partnership transaction; for by giving the bill or note, the demand in respect of which it was given was isolated from the general

St. 102. See, also, *Hamilton v. Hamilton*, 18 id. 20.

In an action by a partner against his co-partner to recover a final balance, where there are no demands outstanding against the partnership, the plaintiff may sustain the action by showing that no part of the outstanding debts due to the partnership can be collected, and thus that the judgment to be rendered will make a final settlement between the partners, more especially if an assignment of all such outstanding debts shall have been tendered to the defendant before the action was commenced. *Williams v. Henshaw*, 11 Pick. 79. See, also, *Sikes v. Work*, 6 Gray, 433; *Williams v. Henshaw*, 12 Pick. 378.

In an action at law on negotiable promissory notes given by one partner to another, for the amount of the balance ascertained upon dissolution, it is not competent for the defendant to show that there had been no final settlement of partnership accounts. *McSherry v. Brooks*, 46 Md. 103. See *Laudry v. Laundry*, 23 La. Ann. 312.

Where a co-partnership was dissolved by one's selling all his interest in the goods and accounts, excepting a few which were reserved to the other two partners, and the books showed an account of the firm against such outgoing partner, which was not excepted, in a suit by the latter against the other two, it was *held*, that the amount of the ac-

count was a proper set-off, and that it was error to refuse testimony showing its amount. *Shennefield v. Dutton*, 85 Ill. 504.

If an agreement of settlement between partners be set aside, in an action upon it, on the ground of fraud in obtaining it, the parties are thereby restored to their original rights and liabilities, and an action of account render will afterwards lie by one against the other. *Leonard v. Leonard*, 1 Watts & Serg. 342.

Where the interest of one partner in the partnership property has been purchased by the other for a gross sum, which purchase was effected by fraud and deception, the party defrauded may repudiate the contract *in toto* and open the account anew, in which case his remedy is in a court of equity. *Chase v. Garvin*, 19 Me. 211. *Hopkins v. Watt*, 13 Ill. 298.

(y) *Fromont v. Coupland*, 2 Bing. 170. See, too, *Lyon v. Haynes*, 5 Man. & Gr. 504, where the sum ascertained to be payable was subject to contingent claims.

(z) This point was raised, but not decided, in *Carr v. Smith*, 5 Q. B. 128, where the action failed, because the account sued on had been made out by a non-partner, and had not been assented to by the partners, and was not stamped as an award.

\*partnership account. (a)<sup>1</sup> An I. O. U. being evidence of an account \*1028 stated, might be sued upon by one partner against another accordingly. (b)

(a) See *Beecham v. Smith*, E. B. & E. 442; *Neale v. Turton*, 4 Bing. 151; *Preston v. Strutton*, 1 Anst. 50; *Fox v. Frith*, 10 M. & W. 131, and *Heywood v. Watson*, 4 Bing. 496. Compare *Tibaldi v. Ellerman*, 6 Dowl. & L. 71. And as to one partner suing another on a bill which he has indorsed, but not with the intention of paying it, see *Denton v. Peters*, L. R. 5 Q. B. 475.

<sup>1</sup> See *Anderson v. Robertson*, 32 Miss. 241; *Powell v. Graves*, 9 La. Ann. 435; *Gibson v. Moore*, 6 N. H. 547; *Sturges v. Swift*, 32 Miss. 239; *Lyon v. Malone*, 4 Port. 497. See, also, *Miller v. Andres*, 13 Ga. 366. See, however, *Buell v. Cole*, 54 Barb. 353.

So, even though the note is for the use of the firm, *Anderson v. Robertson*, *supra*. See, also, *Bonnafee v. Fenner*, 14 Miss. 212; *Mahan v. Sherman*, 7 Blachf. 378.

Where the name of a firm is signed by one of two partners to a note payable to the other, it is, in effect, merely the note of the former to the latter; and the payee may sue the administrator of the other partner on the note, and recover the whole amount, as a court of law could not apportion the debt. *Morrison v. Stockwell*, 9 Dana, 172.

Where it is ascertained by partners, who are about closing their partnership concerns, that a balance will be due to one of them on a final settlement, although the exact amount of such balance cannot be ascertained, yet, if the debtor partner gives the creditor partner a promissory note for a sum not exceeding the amount of the balance which will be due on a final settlement, such note is given on a good and sufficient consideration, and payment thereof may be enforced by action at law, though the balance is not struck be-

tween the partners. *Rockwell v. Wilder*, 4 Metc. 556.

If two partners, upon a settlement of private and partnership accounts which exist between them, find that a balance of the private accounts is in favor of one of them, and a smaller balance of such of the partnership accounts as are considered and adjusted is in favor of the other, and a note is accordingly given for the balance so found of the private accounts, after deducting the balance so found of the partnership accounts, an action may be maintained upon the note, although other unadjusted partnership accounts exist between them. *Currier v. Hale*, 5 Allen, 561.

A balance which may be due on a settlement of a partnership cannot be set up in equity against a note given by one partner to another, and now in the hands of an assignee, on the ground that the assignor had left the State, leaving no property in the State, where the note was not in any way connected with the partnership, and the assignment was made prior to the removal of the assignor. *Pool v. Delaney*, 11 Mo. 570.

The surviving partner of a firm undertook to settle the firm's affairs, took part of the partnership stock, gave his notes to the executors of his deceased partner, and paid all, except one, of said notes. A suit was commenced on the note which remained unpaid: *Held*, on a bill in equity by the surviving partner, praying for an injunction upon the proceedings on said note, and alleging that he had overpaid the executors, that the subject-matter of that part of the bill did not relate to the dealings of the co-partners, and that the court had no jurisdiction. *Burditt v. Grew*, 8 Pick. 108.

Upon precisely the same principle, if a partner leased property to trustees for the firm, and those trustees covenanted to pay the rent, he might sue them on that covenant, although he might, as one of the firm, be bound to indemnify the trustees against all losses sustained by them in that charac-

It is no defense at law to a suit on a promissory note given to a retiring partner by a new firm, to one of whom he transferred his interest in the firm, that such payee had collected moneys belonging to the firm and failed to account for the same. *Burney v. Boone*, 32 Ala. 486.

The defendant, in an action brought against him to recover the amount due upon a promissory note, alleged that plaintiff and himself were co-partners; that the partnership accounts were unsettled; that, upon a settlement, the plaintiff would be found largely indebted to defendant; that plaintiff was insolvent; and that defendant would be irreparably damaged by being compelled to pay plaintiff the amount of the note: *Held*, that these averments, if true, afforded good grounds for invoking the equitable powers of the court to settle the partnership accounts before trying the legal issues involved in the case. *Foulks v. Rhodes*, 12 Nev. 225.

An answer to a suit upon a promissory note against the maker and indorser, averred that the note grew out of certain partnership transactions between plaintiff and one of the defendants, which had proved unsuccessful; that it was indorsed by the other defendant, with the understanding that it was to be paid only in event that the partnership turned out prosperously; that the accounts of the concern were still unsettled, and the maker of the note had paid more than his share of the losses. There was a prayer that the excess of his payments might be allowed as a set-off against the note, and for judgment for the balance. It was not averred that plaintiff was insolvent, and no other ground for equitable relief was stated; neither was an account of the partnership affairs stated or prayed for:

*Held*, that the answer did not state a good defense for either defendant. *Jones v. Shaw*, 67 Mo. 667.

One partner gave his note to another for his interest in land in defense to a suit on it; he alleged that his partner had deceived him in the division of the partnership stock, and was indebted therefor in as great or a greater amount than the sum due on the note: *Held*, that as the division had nothing to do with the consideration of the note, it could not be set up as a counter-claim or defense; and that all the answer, except so much as admitted the execution of the note, and denied indebtedness, should be stricken out. *Case v. Maxey*, 6 Cal. 276.

Where a promissory note is given by one partner, with sureties, to his co-partner, as a guaranty that the interest of the latter in the firm shall not suffer by reason of the failure of the first to pay certain indebtedness for which the firm property is liable, upon breach of the contract the payee of the note can only recover on the note such damages as he has sustained as a partner, and this cannot be ascertained in a court of law. A final settlement of the partnership accounts is an essential basis for the measure of damages in such a case. *Smith v. Riddell*, 87 Ill. 165.

Where one of two partners, being indebted to the firm, gives his note to the other for his proportion of the debt, it is a proper set-off in an action upon a bond executed upon dissolution of the firm by the payee of the note to the maker, conditioned for the payment of the partnership debts. *Merrill v. Green*, 55 N. Y. 270.

A member of a partnership, dealing in real estate, made a note payable to a third person, which became the proper-

ter, and the trustees might themselves be members of the firm; for the covenant to pay the rent constituted a demand distinct from all others. (c)

Again, if one partner received money for the use of the firm in respect of some transaction separate and distinct from its other business, and the money thus received ought to have been divided without reference to other matters, his co-partners might sue him at law for their shares <sup>for money received to plaintiff's use;</sup> of the money in question. (d)<sup>2</sup>

ty of the company; and in the distribution of the proceeds, the note was delivered to another member to collect, retain from it his share, and pay the residue to the treasurer: *Held*, that the party receiving the note could maintain an action thereon in the name of the payee for his own use. *Bowland v. Boozer*, 10 Ala. 690.

A gave B his note, the consideration of which was two-thirds of the profits arising from a partnership formed by A and B. B appropriated one-half instead of one-third of said profits. B's assignee after maturity sued A on the note: *Held*, that A was entitled to be credited with the excess over one-third of the profits. *Carter v. Christie*, 30 Ga. 813.

One partner cannot maintain an action against his co-partner as indorser of a bill of exchange purchased by the company with their own bills, and indorsed to them in blank, the indorsement being filled up payable to one, but it not appearing that the partnership does not own the bill. *Tipton v. Nance*, 4 Ala. 194.

If one partner contribute for his share in the partnership the bond of another partner which, according to the articles of agreement is returned to the obligee on the dissolution of the partnership, no stranger to the transaction can impeach a judgment obtained on the bond. *Cunningham v. Ihmsen*, 63 Pa. St. 351.

An indorsee of the note or bill of a firm to one of its members may maintain an action on the note or bill against the makers or drawers. *Davis v. Briggs* 39 Me. 304; *Hazlehurst, v. Pope* 2 Stew. & Port. 259; *McChesney v. Kipp*, 66

Ill. 460. See, also, *Baring v. Lyman*, 1 Story, 396.

Where three members of a firm gave their joint and several promissory note, payable to the firm, and the firm subsequently indorsed the note to a third person, such third person will hold the note as an individual claim against the makers, as distinguished from a partnership claim, having the right to hold the firm also liable, not as makers but as indorsers; and this individual character of the claim against the makers will not be in the least modified or changed by the fact that the note has been reduced to judgment against them. *Union Natl. Bank v. Bank of Commerce*, 94 Ill. 271.

A partner who has made a promissory note to the partnership as evidence of the amount drawn out of the firm by him, and afterwards, upon dissolution of the partnership, assigned all his interest in the property and debts of the firm to his co-partner, is not liable to an action on the note by the latter, who has taken the note by indorsement from the partnership when overdue, and with notice of the facts. *Stoddard v. Wood*, 9 Gray, 90.

(c) *Bedford v. Brutton*, 1 Bing. N. C. 339. In such a case, however, a counter claim would now be set up, and have to be adjusted.

(d) See *Graham v. Robertson*, 2 T. R. 282. In *Ex parte Dodgson*, Mon. & Mac. Ar. 445, it was held that one of two sub-partners might prove against the other's estate for half of the profits received by him in respect of his share in the principal firm. Compare *Bovill v. Hammond*, 6 B. & C. 149.

<sup>2</sup>If one partner collect a portion of the

So, if one partner paid money of his own to his co-partner, in order that it might be applied by him for some specified partnership purpose, and it was received for that purpose and no other, and was misapplied, an action lay for the recovery of such money; for, *ex hypothesi*, it never was the money of the firm, and the duty of the partner who received that money was either to apply it as agreed, or to return it intact. (e)

So a purchaser of a partner's share at a price calculated on the profits, could recover the amount which he had overpaid in ignorance of the real state of the accounts. (f)<sup>3</sup>

Again, if, in respect of some particular transaction, one partner had expressly agreed to indemnify another, and had not done so, an action might be brought by the latter against the former, inasmuch as the right to be indemnified had, by agreement, been made independent of all other questions between the partners. (g) Therefore, where one partner in his own name accepted a

bill for a partnership debt, on the faith of a promise by one of the other partners that he would provide funds to pay the bill, \*and the acceptor was nevertheless compelled to pay it, he was held entitled to recover the whole amount from the other partner. (h)

Further, if some of a number of partners gave their promissory note for better securing payment of a debt owing by them and their co-partners, and one of the makers of the note was compelled to pay the whole amount of it, he was entitled to sue each of the other makers of

claims due the firm, and fail to account for the amount so collected in the partnership settlement, he may be sued by the other partner without any impeachment of the settlement or re-adjustment of the partnership accounts. Partners are not forbidden to sue each other at law, merely because they are or have been partners, but only when the adjustment of the matter in controversy involves the investigation and settlement of partnership accounts. *Russell v. Grimes*, 46 Mo. 410.

(e) See *Wright v. Hunter*, 1 East, 20.

(f) *Townsend v. Crowdy*, 8 C. B. N. S. 477.

<sup>3</sup> One partner may maintain an action of assumpsit against his co-partner, after a dissolution of the partnership, to recover back money paid by mistake, on an adjustment of the partnership concerns. *Bond v. Hays*, 12 Mass. 34. See, also, *Beidler v. Shallenberger*, 42 Iowa, 203.

If, however, upon an attempted settlement between partners, the account between them is not correctly stated, an

assumpsit will not lie to recover the alleged balance; the remedy is by bill in chancery for a settlement of the partnership accounts. *Hanks v. Barber*, 53 Ill. 292.

Action on promissory note given partner by co-partner on settlement of firm affairs. Defendant offered to prove, under plea of set-off, that a mistake was made in the settlement, and that plaintiff's share of the rent due defendant from the firm for the use of a store owned by him, was accidentally omitted from the settlement: *Held*, that unless there was an adjustment of these items and a promise to the plaintiff to pay, they constituted no defense at law; and that even if they could in any manner be used as a defense to the action on the note, they were admissible only as showing only a failure of consideration and not as a set-off. *Johnson v. Wilson*, 54 Ill. 419.

(g) *Coffee v. Brian*, 3 Bing. 54; see, too, *Wilson v. Cutting*, 10 Bing. 436; *Brown v. Tapscott*, 6 M. & W. 119.

(h) *Coffee v. Brian*, 2 Bing. 54.

the note for his proportion of the sum so paid. For, in the case supposed, the right to contribution arose in respect of a matter not involved in the general account, and did not depend upon the circumstance that the makers of the note were partners. This was decided by the Court of Exchequer in *Sedgwick v. Daniell*. (i)<sup>1</sup>

However, the decisions did not go the length of allowing one partner who had been compelled to pay the whole of a partnership debt to sue his co-partners at law for contribution, in the absence of special circumstances. (k)<sup>2</sup>

for contribution when one has paid more than his share of a debt of the firm.

(i) *Sedgwick v. Daniell*, 2 H. & N. 319.

<sup>1</sup> If, after the dissolution of a partnership, the several partners sign their individual names to a note for a partnership debt, and one afterwards pays off this note, he cannot maintain an action at law against the others for contribution without showing that the business of the partnership is settled. *DeJarnette v. McQueen*, 31 Ala. 230; *White v. Harlow*, 5 Gray, 463; *Haskell v. Adams*, 7 Pick. 59.

If the note of one of two partners, actually given for a partnership debt, be paid by the other member of the firm, the partner so paying the firm debt cannot afterwards, by obtaining a transfer of the note to himself, collect the whole amount of the note of the maker. *Tucker v. Peaslee*, 36 N. H. 167.

(k) *Sadler v. Nixon*, 5 B. & Ad. 936. See, too, *Batard v. Hawes*, 2 E. & B. 287; *Helme v. Smith*, 7 Bing. 713; and *Pearson v. Skelton*, 1 M. & W. 504; and compare *Woolley v. Batte*, 2 C. & P. 417; *Osborne v. Harper*, 1 Smith, 411.

<sup>2</sup> *Harris v. Harris*, 39 N. H. 45; *Lawrence v. Clark*, 9 Dana, 257; *Morin v. Martin*, 25 Mo. 360; *Kennedy v. McFaddon*, 3 Har. & J. 194; *Westerlo v. Evertson*, 1 Wend. 532 (a law partnership); *Gridley v. Dole*, 4 N. Y. 487; *Bracken v. Kennedy*, 3 Scam. 558; *Haskell v. Adams*, 7 Pick. 59; *Murray v. Bogert*, 14 John. 318; *Roberts v. Fittler*, 13 Pa. St. 265; *Torrey v. Twombly*, 57 How. Pr. 149; *Succession of Powell*, 14 La. Ann. 425. See *Johnson*

*v. Kelly*, 4 Thomp. & C. 417; *Bumpuss v. Webb*, 1 Stew. 19.

An agreement between two co-partners, after dissolution of their co-partnership, to the effect that they would "quit even," to avoid the expense of a chancery suit, does not authorize one to maintain an action at law against the other to recover contribution for a partnership debt subsequently paid. *DeJarnette v. McQueen*, 31 Ala. 230.

A, B, and C being partners, D, with the consent of A, bought out the interest of B and C, and became the partner of A. D agreed with B and C to pay their proportion of the outstanding debts of the old firm. After the dissolution of the partnership between A and D, A paid the debts of the old firm, which D had agreed to pay: *Held*, that A could not maintain an action at law to recover the amount of D. *Phillips v. Lockhart*, 1 Ala. 521.

A partner who in prosecuting the partnership enterprise has advanced in excess of what was required of him by the terms of the partnership, cannot, in the absence of a contract authorizing it, maintain an action for contribution of the excess without going into a general settlement of the partnership accounts, under proper averments in the pleading. *Merriwether v. Harderveau*, 51 Tex. 436.

H. and S. made a joint purchase of a quantity of goods, each paying one-half of the price. They sold to A. one package of the goods, on a credit of five months, and afterwards divided the re-

But if one of several projectors of a company was compelled to pay a debt owing by them all, he could obtain contribution from them by an action at law, although there were unsettled accounts between him and them. (*l*)

mainder of the goods between them, and H. paid S. for one-half of the price of the package sold. A. having become insolvent, H. brought *assumpsit* against S. to recover one-half the loss arising on the sale: *Held*, a co-partnership concern, and an action at law therefore not maintainable without proving express promise to pay. *Halstead v. Schmelzel*, 17 Johns. 80.

*Assumpsit* by the executor of A against B to recover the share of losses due from B on a speculation which had been carried on by A, B and C, but which had been closed and the losses ascertained. All the capital had been furnished by A: *Held*, that the action was properly brought, and could be maintained without proof of a settlement between A, B and C as co-partners, and of a promise by B to pay the amount due to A in such settlement. *Fry v. Potter*, 12 R. I. 542.

Where, upon a dissolution of partnership, one member of the firm executes to another member a promissory note for the amount found to be due him on settlement, and subsequently pays a debt of the firm not included in the settlement, in a suit on the note, the payer may plead as a set-off the payment of such partnership debt, and require the other partner to contribute his proportion of the amount thus paid; and in order to recover, it is not necessary that the defendant should prove an agreement by the retiring partner to contribute to the payment of such debt. *Farwell v. Tyler*, 5 Iowa, 535.

Where upon the dissolution of a partnership and the settlement of its affairs, one partner pays more than his share of the partnership debts, or pays the other

partner a certain sum, for which the latter agrees to pay the former's share of such debts, which sum the latter converts to his own use, there is created an individual liability in favor of the former against the latter, which upon his death will constitute a proper claim against his estate. *Price v. Cavins*, 50 Ind. 122.

If upon the dissolution of a firm there is an oral agreement between the partners, that one of them shall take the joint property and pay the joint debts, and after taking the property he fails to pay the debts, the other may voluntarily pay them, and maintain an action against the former, to recover the amounts so paid by him. *Hunt v. Rogers*, 7 Allen (Mass.), 469.

A partner who, upon the dissolution of the partnership, has received all the partnership assets, and agreed to apply them to the payment of the outstanding debts, for which they are sufficient, is not liable to an action at law by his co-partner for the amount of a partnership debt which he has been obliged to pay, without showing a final settlement of the partnership business, or that there are no other debts outstanding. *Shattuck v. Lawson*, 10 Gray (Mass.) 405.

The plaintiff and defendant were partners, and for settlement of their accounts referred them to arbitrators, who awarded that each party pay one-half of the outstanding debts of the firm. The plaintiff paid the whole: *Held*, that he was entitled to recover one-half from the defendant in an action at law. *Coleman v. Coleman*, 12 Rich. 183.

(*l*) *Batard v. Hawes*, 2 E. & B. 287; *Boulter v. Peplow*, 9 C. B. 493.

*When an action would not lie.*

It is clear from the cases referred to in the last few pages, that there was no such rule as that one partner could not sue another at law, in respect of a debt arising out of a partnership transaction, and that this circumstance alone afforded no reason why an action should not be brought by one partner against another. (*m*) Except, however, in an action of account, it was a general rule that between partners, whether they were so in general or for a particular transaction only, no account could be taken at law (*n*); nor (except in an action of account) could one partner sue another at law, unless the cause of

General rule that one partner cannot sue another at law;

in respect of any matter involving the partnership account.<sup>3</sup>

(*m*) See *Worrall v. Grayson*, 1 M. & W. 166.

(*n*) *Bovill v. Hammond*, 6 B. & C. 151; and see *Scott v. McIntosh*, 2 Camp. 238.

<sup>3</sup> *Beach v. Hotchkiss*, 2 Conn. 425; *Tolford v. Tolford*, 44 Wis. 547; *Dewit v. Staniford*, 1 Root, 270; *Lamolere v. Caze*, 1 Wash. 435; *Kennedy v. M'Faddon*, 3 Har. & J. 194; *Ozeas v. Tolman*, 1 Binn. 191; *Young v. Brick*, 3 N. J. L. 663; *Murray v. Bogert*, 14 Johns. 318; *Springer v. Cabell*, 10 Mo. 640; *McKnight v. McCutchen*, 27 Mo. 436; *Robinson v. Green*, 5 Harr. 115; *Smith v. Smith*, 33 Mo. 557; *Ives v. Miller*, 19 Barb. 196; *Lower v. Denton*, 9 Wis. 268; *Towle v. Meserve*, 38 N. H. 9; *Wescott v. Price*, *Wright*, 220; *Chase v. Garvin*, 19 Me. 211; *Burley v. Harris*, 8 N. H. 233; *Estes v. Whipple*, 12 Vt. 373; *Graham v. Holt*, 3 Ired. L. 300; *Stalhart v. Knox*, 5 Mo. 112; *Davenport v. Gear*, 2 Seam. 495; *Course v. Prince*, 1 Mill Const. 413; *Austin v. Vaughan*, 14 La. Ann. 43; *Collamer v. Foster*, 26 Vt. 754; *Holyoke v. Mayo*, 50 Me. 385; *Goldsborough v. McWilliams*, 2 Cranch C. Ct. 401; *Barry v. Barry*, 3 id. 120; *Pote v. Philips*, 5 id. 154; *Riggs v. Stewart*, 2 id. 171; *Chadsey v. Harrison*, 11 Ill. 151; *Gomersall v. Gomersall*, 14 Allen, 60; *Spear v. Newell*, 13 Vt. 288; *Riari v. Wilhelm*, 3 Gill. 356; *Purvines v. Champion*, 67 Ill. 459; *Robinson v. Bulloch*, 58 Ala. 618; *Buell v. Cole*, 54 Barb. 353; *Succession of Dolhoude*, 21

La. Ann. 3; *Marx v. Bloom*, id. 6; *Sewell v. Cooper*, id. 582; *Burns v. Nottighaus*; 60 Ill. 531; *Page v. Thompson*, 33 Ind. 137; *Stanton v. Buckner*, 24 La. Ann. 391; *Ross v. Cornell*, 45 Cal. 133; *Allen v. Davis*, 13 Ark. 28. See *Perley v. Brown*, 12 N. H. 493; *Russell v. Minnesota Outfit*, 1 Minn. 162; *Myrick v. Dawe*, 9 Cush. 248; *Murdock v. Martin*, 20 Miss. 660; *Welt v. Bird*, 7 Blackf. 258; *Cuviz v. Burnett*, 36 Ind. 103; *Scott v. Caruth*, 50 Mo. 120; *Leidy v. Messenger*, 71 Pa. St. 177; *Sproat v. Crowley*, 30 Wis. 187; *Dehority v. Nelson*, 56 Ind. 414; *Colville v. Gilman*, 13 W. Va. 315; *Lazar v. Pearson*, 59 Me. 561; *Learned v. Ayers*, 41 Mich. 677; *Heavilon v. Heavilon*, 29 Ind. 509; *Shalter v. Caldwell*, 27 id. 376; *Wallace v. Hull*, 28 Geo. 68; *Hall v. Logan*, 34 Pa. St. 331; *Jennison v. Walsh*, 30 Ind. 167.

Equity and not assumpsit is the appropriate remedy for one whose membership and consequent rights in the profits of a partnership are denied, and to whom no portion of the profits have been set apart. *Pray v. Mitchell*, 60 Me. 430.

If commission merchants, having in their hands a balance in favor of partners who have consigned goods to them for sale, refuse to pay the whole or any part of the amount to either partner without the consent of the other, and afterwards of their own motion transfer the balance upon their books to the

action was so distinct from the partnership accounts as not to involve their consid.

credit of one of the partners, without his knowledge, this will not authorize the other partner to maintain an action against his associate to whom this transfer was made, to recover one half of the amount; nor can such action be sustained by proof that subsequently to its commencement the defendant received of the commission merchants the whole amount so transferred to him. *Hill v. Clarke*, 7 Allen, 414.

Where partnership accounts remain unsettled after dissolution, and it is questionable which of the partners will be found indebted to the other, this can not be settled by a trustee process, nor can that process be maintained against one partner to get at a balance which it is supposed will be found due to the other on an adjustment of the accounts. *Burnham v. Hopkinson*, 17 N. H. 259.

In Iowa it is held that, where a party was garnished who had been a partner of the defendant and held unpaid accounts belonging to the firm, judgment should not be rendered against him absolutely for the amount of the defendant's interest in the accounts, but that he should be directed to pay over the sum to which the partner was entitled as it should be collected. *Cox v. Russell*, 44 Iowa, 556.

In the same State it is held that if a partner is garnished in an action against his co-partner, he has a right to deduct from the amount he may owe the latter any liability which he could claim against the co-partner in a settlement with him. *Cox v. Russell*, 44 Iowa, 556.

A and B were partners, and A owned a steamboat. The partnership furnished materials and labor to repair and furnish the boat. B, as surviving partner, instituted proceedings *in rem* (against the boat) to procure compensation: *Held*, that such a proceeding could not

be sustained in such a case. *Thompson v. Steamboat Morton*, 2 Ohio St. 26.

As no action can be brought by one partner against his co-partner upon any partnership transaction, unless there has been a settlement of the whole concern or of the claim in question, and a promise of payment, the unsettled dealings of either partner with the firm cannot be set-off in an action at law, by one partner against the other. *Odiorne v. Woodman*, 39 N. H. 541; *Finney v. Turner*, 10 Mo. 207; *Wiggin v. Goodwin*, 63 Me. 389; *Wright v. Jacobs*, 61 Mo. 19; *Leabo v. Renshaw*, *id.* 292; *Elder's appeal*, 39 Mich. 474. See *Roberts v. Fidler*, 13 Pa. St. 265; *Foulks v. Rhodes*, 12 Nev. 225.

One of the owners of a steamboat, who were held to be partners in its earnings, became indebted to the firm for services rendered him in his private business; the managing partner assigned the debt to a stranger, who sued on it; the defendant set up that the assignment was without his knowledge or consent and that he had received no part of the proceeds thereof: *Held*, that he was liable to the plaintiff in an action brought in his own name, and that as the allowance of a set-off claimed by him would involve a general settlement of the whole account, and as it did not appear that he could be injured by its disallowance, that it should be disallowed. *Russell v. Minnesota Outfit*, 1 Minn. 162.

If, after the dissolution of a partnership between A and B, the parties agree that A shall pay with his own funds, certain debts of B's and certain debts of the firm, in discharge of a note which, previously to such agreement, had been given by A to B. and the payments be accordingly made, such payments to the amount of the private debts of B, and of half of the partnership

eration (*o*); nor unless the plaintiff if he recovered would be justified in keeping what he might get without afterwards having to account to his co-partners for any part of it. (*p*). Hence one \*partner could not sue another \*1030 at law for work and labor done for the firm, and therefore on account as well of the plaintiff as of the defendant (*q*);<sup>1</sup> nor for money had and received for the firm, for it must be properly shared between the parties to the action (*r*); nor for money paid to the use of the defendant, if the question whether he ought to

debts, thus paid, constitute a good defense to a suit at law on the note. *Griffith v. Hill*, 7 Blackf. 324.

A purchased the interest of B, a partner in a mercantile concern, became a member of it, undertook to pay all the liabilities of B as such partner, and to occupy his situation in respect to the partnership. Afterwards A acquired a note made by the firm previous to his admission: *Held*, that it was competent for A to maintain an action against any of the makers in virtue of the indorsement to him, except B. *Penn. v. Stone*, 10 Ala. 209.

A member of a firm which consists of more than two persons, is liable to his partners jointly for a sum which, upon settlement, he is found to have withdrawn from the joint funds in excess of his share; and one of them cannot maintain an action therefor in his own name alone, although he has an assignment of all the right and interest of his associates in the assets of the firm. *Wiggin v. Cumings*, 8 Allen, 353.

The fact that a partner who has purchased a negotiable security against the firm cannot enforce the obligation at law, affects only the remedy, and not the right; and a third person, not a partner, to whom he indorses the same, may maintain an action thereon against the firm. *Kipp v. McChesney*, 66 Ill. 460; *Davis v. Briggs*, 39 Me. 304; *Hazlehurst v. Pope*, 2 Stew. & Port. 259; *Pike v. Hart*, 3 La. Ann. 868. See, also, *Russell v. Minnesota outfit*, 1 Minn. 162. *Roberts v. Ripley*, 14 Conn. 543.

The individual members of a commercial firm may execute a valid note, and a valid mortgage securing said

note on their individual property in favor of the firm, and any third person, acquiring the note from the firm in good faith for value and before maturity may enforce its payment. *Pike v. Hart*, 30 La. An. 868.

A note by a partnership to one of its members for money borrowed may be enforced at law in the name of an indorsee not a member of the partnership, although the payee be a party defendant, and the real owner of the note, in case no reason appears why a judgment at law would not do legal justice between the real parties. *Walker v. Wait*, 50 Vt. 668; *Roberts v. Ripley*, 14 Conn. 543.

(*o*) See note (*n*) *supra*, and see the cases in the six following notes. This rule was held to prevent the *cestui que trust* of a partner from suing the other partners. See *Goddart v. Hodges*, 1 Cr. & M. 33. *Sed quere*. The same rule would probably have prevented a person entitled to a share of profits from suing at law for them where they had not been ascertained.

(*p*) *Milburn v. Codd*, 7 B. & C. 421; *Bedford v. Brutton*, 1 Bing. N. C. 405; *Caldicott v. Griffiths*, 8 Ex. 898.

(*q*) *Goddart v. Hodges*, 1 Cr. & M. 33; *Holmes v. Higgins*, 1 B. & C. 74; *Milburn v. Codd*, 7 B. & C. 419; *Lucas v. Beach*, 1 Man. & Gr. 417.

<sup>1</sup> *Causter v. Burke*, 2 Harr. & G. 295; *Taylor v. Smith*, 3 Cranch C. Ct. 241.

(*r*) *Bovill v. Hammond*, 6 B. & C. 149; *Smith v. Barrow*, 2 T. R. 476; *Fromont v. Coupland*, 2 Bing. 170. See, too, *Lewis v. Edwards*, 7 M. & W. 300; *Thomas v. Thomas*, 5 Ex. 28.

repay it or not turned on the state of the partnership accounts (*s*); nor for money lent to the firm of which the plaintiff was himself a member, for the advance only formed an item in the partnership account (*t*);<sup>2</sup> nor on a bill or note drawn, accepted, or endorsed in such a manner as to bind the firm jointly and not its members severally also, for in such a case not only must the plaintiff as one of the firm have contributed to payment of the instrument, but he ought also to have been a defendant to the action. (*u*) For similar reasons, if partners became indebted to a third person who died, and appointed one of them his executor, this one could not even as executor sue his co-partners for the debt due to the deceased (*x*);<sup>3</sup> and if there were two firms with a partner common to both, one firm could not sue the other at law (*y*); neither was there any mode by which at law one partner could sue the *firm* or be sued by it. (*z*) But upon a joint and several promissory note. a

(*s*) *Robson v. Curtis*, 1 Stark. 78. But see *Townsend v. Crowdy*, 8 C. B. N. S. 477, noticed *ante*, p. 1028.

(*t*) *Perring v. Hone*, 4 Bing. 28; *Colley v. Smith*, 2 Moo. & Rob. 96.

<sup>2</sup> One member of a firm cannot sue the others for advances made by him on account of the firm; and, in such case, a bill in equity is as necessary to settle the account, as in the case of any other partnership account. *Mickle v. Peet*, 43 Conn. 65; *Bracken v. Kennedy*, 3 Scam. 558; *Hennegin v. Wilcoxon*, 13 La. Ann. 576; *Crottes v. Frigerio*, 18 id. 283; *Gridley v. Dole*, 4 N. Y. 486; *Merrewether v. Hardeman*, 51 Tex. 436; *Halderman v. Halderman*, 1 Hempst. 559; *Seighortner v. Weissenborn*, 20 N. J. Eq. 172.

An action will not lie upon a written instrument executed by the defendant acknowledging receipt from the plaintiff of money "placed to the credit of our account," unless the plaintiff proves that no unsettled partnership existed at the time. *Houston v. Brown*, 23 Ark. 333.

In case, however, of an express promise by one partner to repay to the other his share of advances made by the latter on account of partnership business, the amount of such share becomes the debt of the promisor, recoverable by direct action therefor, without dissolution of the partnership or adjustment of the partnership accounts. *Gauger v. Pantz*, 45 Wis. 449; *Sprout v. Crowley*, 30 id. 187.

(*u*) See *Neale v. Turton*, 4 Bing. 149; *Mainwaring v. Newman*, 2 Bos. & P. 120; *Teague v. Hubbard*, 8 B. & C. 345, and 2 Man. & Ry. 369; *Tibaldi v. Ellerman*, 6 Dowl. & L. 71.

(*x*) *Moffatt v. VanMillingen*, cited, 2 Bos. & P. 124.

<sup>3</sup> The executrix of a deceased member of a firm cannot recover the amount of a note given by the firm assigned to her, or foreclose a mortgage given by another member of the firm, as security for the note. *Lindell v. Lee*, 34 Mo. 103.

The relation of debtor and creditor between the surviving partner and the representative of the deceased partner does not arise until the affairs of the partnership are wound up and a balance is struck. Such balance is to be struck after all the partnership affairs are settled. *Gleason v. White*, 34 Cal. 258; *White v. Waide*, 1 Miss. 263; *Ozeas v. Johnson*, 4 Dall. 434; *Singiser's appeal*, 28 Pa. St. 524; *Howard v. Patrick*, 38 Mich. 796. See *Frederick v. Cooper*, 3 Iowa, 171; *Shields v. Fuller*, 4 Wis. 102.

(*y*) *Perring v. Hone*, 2 Car. & P. 401, and 4 Bing. 28; *Mainwaring v. Newman*, 2 Bos. & P. 120; *Bosanquet v. Wray*, 6 Taunt. 597; *Jacaud v. French*, 12 East, 317.

(*z*) See, in addition to the cases cited in the last note, *DeTastet v. Shaw*, 1 B. & A. 664, and *Richardson v. The Bank of England*, 4 M. & Cr. 171, 172, *per* Lord Cottenham.

partner might be sued by his co-partners or by a firm of which they were members. (a)

Again, as one tenant in common of personalty could not sue his co-tenant for the recovery of that property, it follows that one partner could not, by action at law, obtain from his co-partner property of the firm wrongfully detained by him. (b)

Actions for recovery of partnership goods, &c.

It was not, however, so clear that if one partner wrongfully sold property \*of the firm, his co-partner could not sue him at law, either for the wrongful conversion or for a share of the produce of the sale. For although the older decisions were opposed to any such right (c), it was held in *Mayhew v. Herrick* (d), that a sheriff who, under a *fi. fa.* against one partner, sold goods of the firm, was answerable at law to the assignees of the other partner for one-half of the proceeds of the sale; and it was previously held, in *Barton v. Williams* (e), that a sale by one tenant in common of the common property gave the other a right to sue him at law for a wrongful conversion. (f) The question, therefore, whether if one partner wrongfully sold the goods of the firm, he could or could not be sued at law by his co-partners, seems to have turned on whether a demand in respect of this wrongful sale could or could not be regarded as independent of any question of account, so as to bring the case within the exception already noticed.

\*1031 Actions for improper sale.

*Mayhew v. Herrick.*

*Barton v. Williams.*

Moreover, a partner could not maintain an action on a bill of exchange drawn by himself on a firm of which he was a member (g), and this rule applied to all unincorporated companies.

Nor could an action be brought by one firm against another firm where one or more persons were partners in both firms. (h)<sup>1</sup> Even where the common partner was dead, the one firm could not sue the other in respect of contracts entered into between the two firms when he was a partner in each of them; for no legal contract could subsist be-

Actions between two firms with a common partner.

(a) See *Beecham v. Smith*, E. B. & E. 442, and *ante*, p. 1028.

(b) See *Fox v. Hanbury*, Cowp. 445. In *Sharp v. Warren*, 6 Price, 131, it was, however, held that the steward of a friendly society was entitled to recover, at law, a box of money belonging to the society, but run off with by one of its members.

(c) *Graves v. Sawcer*, Sir T. Raym. 15.

(d) 7 C. B. 229. See, too, *Buckley v. Barber*, 6 Ex. 164; and compare *Morgan v. Marquis*, 9 Ex. 145.

(e) B. & A. 395, affirmed on appeal, *Williams v. Barton*, 3 Bing. 139. See, too, *Farrar v. Beswick*, 1 M. & W. 682.

(f) Agreed to by Maule, J., in *Mayhew v. Herrick*, 7 C. B. 247; and by Wood, V.-C. in *Frazer v. Kershaw*, 2 K. & J. 500; but see *per* Coltman, J.,

7 C. B. 246, and *Jacobs v. Seward*, L. R. 5 H. L. 464.

(g) *Neale v. Turton*, 4 Bing. 149. See, too, *Teague v. Hubbard*, 8 B. & C. 345, and 2 Man. & Ry. 369.

(h) See *Moffat v. Van Millingen*, 2 Bcs. & P. 124, note; *Mainwaring v. Newman*, ib. 120; *Pering v. Hone*, 2 C. & P. 401, and 4 Bing. 28; *Jacaud v. French*, 12 East, 317; *DeTastet v. Shaw*, 1 B. & A. 664.

<sup>1</sup> See *Haven v. Wakefield*, 39 Ill. 509; *Englis v. Furniss*, 4 E. D. Smith, 587; *Calvit v. Markham*, 4 Miss. 343; *Rogers v. Rogers*, 5 Ired. Eq. 31.

See, also, *Penrock v. Swayne*, 6 W. & S. 239; *Blaisdell v. Pray*, 68 Me. 269.

Where A & B are partners in one firm, and B & C are partners in another, and A & B execute a negotiable note to

tween a person and those connected with him on the one side, and himself and others connected with him on the other side. (i)<sup>2</sup>

Fox v. Hanbury (*k*) was the leading authority for the rule that one partner could not sue another at law on the ground that the other detained, and used for his own exclusive purposes, personal property belonging to the firm; and for the further rule that if one partner sold such property, neither the other partners nor their assignees in bankruptcy could maintain an action against the purchaser in respect of his detention of the goods purchased. (l)

\*1032 \*Where a partnership had been dissolved, and the winding up of its affairs had been entrusted to one or two individuals, and they had taken upon themselves the duty of getting in the assets, and paying the debts, and dividing the surplus, they could not, under ordinary circumstances, be compelled by proceedings at law to pay over that surplus to those entitled to it. (m) If indeed, the accounts had all been taken, and the net balance payable to any particular partner had been ascertained, and if such balance clearly ought to be paid over at once, then an action for it might be brought (n); but in other cases recourse must have been had to a court of equity.

the firm of B & C, B & C cannot maintain an action against A. Banks v. Mitchell, 8 Yerg. 111. See, also, Penrock v. Swayne, *supra*.

Where, however, one who is a member of two firms makes a note in the name of one of the firms, payable to a member of the other firm, the payee may sue and recover upon it in his own name. Moore v. Gano, 12 Ohio, 300.

The Pennsylvania act of April 14, 1838, which allows the same person to be a plaintiff and defendant in a cause, is restricted to cases in which the same individual is a member of two distinct co-partnerships. Hence, one partner cannot bring assumpsit against himself and his co-partners, instead of account render against them. Miller v. Knauff, 2 Pa. Law Jour. Rep. 11; Hall v. Logan, 34 Pa. St. 331. See, also, Gibson v. Ohio Farina Co. 2 Disney, 499.

If A be a partner in both the firms, A & B and A & C, and A & C be indebted to A & B, A & B cannot sue C alone for the partnership debt, under the Pennsylvania act of 1838. Pennrock v. Swayne, 6 W. & S. 229.

The Pennsylvania act of 1838, giving a remedy at law to parties who are part-

ners of several firms against each other, did not take away the previously existing remedy in equity. Wentworth v. Raigvel, 9 Phil. 275.

(i) Bosanquet v. Wray, 6 Taunt. 597.

<sup>2</sup> Miller v. Thorn, R. M. Charl. 180.

See, however, Lacy v. Le Bruce, 6 Ala. 904.

(k) Cowp. 445. This case was always followed with approbation. See Smith v. Stokes, 1 East, 363; Smith v. Oriell, ib. 368; Harvey v. Crickett, 5 M. & S. 336; Buckley v. Barber, 6 Ex. 184; Harper v. Godsell, L. R. 5 Q. B. 422.

(l) It seems from Morgan v. Marquis, 9 Ex. 145, that if a solvent partner sells goods of the firm, the purchaser, if he afterwards sells the goods, cannot be compelled to hand over any part of the proceeds to the trustee of the insolvent partners. Compare this with Mayhew v. Herrick, 7 C. B. 229, and Buckley v. Barber, 6 Ex. 164.

(m) Lyon v. Haynes, 5 Man. & Gr. 504, and see Lewis v. Edwards, 7 M. & W. 300, as to a receiver suing for money withheld from him by those who agreed that he should receive and distribute it.

(n) *Ante*, p. 1027.

### 3. *Actions between companies and their shareholders.*

With respect to ordinary actions between companies and their shareholders, little remains to be added to what has been said in previous chapters. The following subjects have, in fact, been already considered, viz.:—

Actions between companies and their members.

1. Actions between the promoters of companies and by and against persons who have subscribed for shares. (*o*)

2. Applications by shareholders to have a company's register rectified. (*p*)

3. Actions by shareholders whose shares have been illegally forfeited. (*q*)

4. Actions between the buyers and sellers of shares, and between them and the brokers employed by them. (*r*)

There only remains for consideration in the present place a few rules relating to actions for calls and dividends, and the remedy by *mandamus* in the case of the non-performance by companies of their duties toward their shareholders.

#### \**Actions for calls.*

\*1033

An action for calls (*s*) must be brought in the name of the company, if it is incorporated; and in the name of the public officer if the company is empowered to sue its shareholders in that manner. (*t*) In cost-book companies the pursuer now can sue. (*u*)

Actions for calls.

Several of the modern acts of Parliament relating to companies, contain provisions having for their object the simplification of the pleading and proofs in actions for calls. (*x*) Their general effect is to render it necessary for a statement of claim in an action for calls to state merely that the defendant, as a shareholder, is indebted to the company in so much money for calls,

Statutory enactments.

(*o*) *Ante*, p. 117 *et seq.* and p. 1019.

(*p*) *Ante*, pp. 142, 171.

(*q*) *Ante*, pp. 144, 751.

(*r*) *Ante*, p. 710 *et seq.*

(*s*) As to which, see *ante*, p. 623 *et seq.*

(*t*) *Chapman v. Milvain*, 5 Ex. 61;

*Wills v. Sutherland*, 4 Ex. 211, affirmed in error, 5 Ex. 715; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Lawrence v. Wynn*,

5 M. & W. 355; *Smith v. Goldsworthy*, 4 Q. B. 430. See a declaration in an action for calls, by a company incorporated by the Canadian legislature, *Welland Rail. Co. v. Blake*, 6 H. & N. 410.

(*u*) 32 & 33 Vict. c. 19, § 13.

(*x*) See 8 & 9 Vict. c. 16, §§ 26-28, 25 & 26 Vict. c. 89, § 70.

omitting all statements respecting the making of the calls in question. (*y*) As regards proof, the general effect of the provisions referred to is to render it necessary to show merely three things; viz., first, that the calls sued for were made in point of fact; secondly, that the defendant is, or was, a shareholder when the call was made (*z*); and, thirdly, that he has had proper notice of the making of the call.

Time for bringing action. Calls made payable by statute (*a*), or by deed, are specialty debts; and an action for their recovery is not, therefore, barred by the lapse of less than twenty years. (*b*)

Defenses. \*1034 \*The usual grounds of defense to an action for calls have all been considered in previous chapters. They may be reduced to:—

1. A denial that the defendant is a person liable to pay the call. (*c*)
2. A denial of the making of the call in point of fact.
3. A denial that the call, admitted to have been made in point of fact, was authorized (*d*), was made by competent persons (*e*), or in the proper manner (*f*), or for proper purposes. (*g*)
4. A denial of any notice of the call.
5. A denial of such notice as the defendant was entitled to receive. (*h*)
6. Set off. (*i*)
7. Infancy. (*k*)
8. Fraud. (*l*)

(*y*) See, as to the necessity of adopting the statutory forms, *Wolverhampton, &c. Waterw. Co. v. Hawksford*, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 546; *Dundalk, &c. Rail. Co. v. Tapster*, 1 Q. B. 667; *Newport, &c. Rail. Co. v. Hawes*, 3 Ex. 476; *Wilson v. Birkenhead, &c. Rail. Co.* 6 Ex. 626, and as to actions against executors, *Birkenhead, &c. Rail. Co. v. Cotesworth*, 5 Ex. 226.

(*z*) See, as to this, *ante*, p. 138, etc.

(*a*) Calls made under a colonial act are simple contract debts only. See *Welland Rail. Co. v. Blake*, 6 H. & N. 415.

(*b*) *Cork and Bandon Rail. Co. v. Goode*, 13 C. B. 826. Compare *Robinson's case*, 6 DeG. M. & G. 572.

(*c*) See *ante*, p. 634 *et seq.*, and as to estoppel by conduct, *ante*, p. 635.

(*d*) *Ante*, p. 629.

(*e*) *Ante*, p. 624.

(*f*) *Ante*, p. 629.

(*g*) *Ante*, p. 625.

(*h*) *Ante*, p. 632. In an action for calls against a contributory of a limited company being wound up voluntarily, it is no defense that the defendant had no notice that his name was placed upon the list of contributories, see *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. 175.

(*i*) *Ante*, p. 511, and *infra*, under Winding-up. As to setting off calls not yet due where a shareholder sues a company, *Ryland v. Delisle*, L. R. 3 P. C. 17.

(*k*) *Ante*, pp. 81, 636.

(*l*) *Ante*, p. 636, and *Smith v. Reese River Co.* 2 Eq. 264.

It must be borne in mind, that if a shareholder does not avail himself of such defense as he may have at the proper time, he will be precluded from afterwards disputing either the validity of the call, or his liability to pay it. (*m*)

Evidence of the making of a call is usually given by proving the resolution by which it was made; and this may be done either by the testimony of the company's secretary, or some other person having actual knowledge of the fact, or by the company's minute books, which, as was seen in a former chapter, are in many cases made admissible as evidence of the facts stated in them. (*n*)

Evidence.

Evidence that the defendant is or was a shareholder is usually \*given by the production of the company's register, \*1035 the effect of which has been considered already. (*o*)

Evidence that the defendant received due notice of the making of the call must be given by showing that the requisite advertisements (if any) were published, and that such notice as he was entitled to receive either actually reached him, or was so sent to him as to have probably reached him. This will be sufficient, in default of evidence that what was so sent him did not reach him. (*p*)

### *Actions for dividends.*

Dividends (*q*), which are actually declared and payable by an incorporated company, are recoverable by action brought by the person having the legal title to receive them, against the company. The plaintiff must prove that the dividend sought to be recovered has been declared, and has become payable, and that he has the legal title to the dividend payable in respect of the shares by virtue of which he claims it. The circumstance that he is not a registered shareholder will not prejudice him if he has been wrongfully removed by the company from the register (*r*); nor will the circumstance that the plaintiff is a married woman be fatal to her claim if she might have sued with her husband. (*s*)

Actions for dividends.

(*m*) See *Thames Haven, &c. Co. v. Hall*, 5 Man. & Gr. 274; *Thames Haven, &c. Co. v. Rose*, 4 ib. 552.

(*n*) See *ante*, p. 550.

(*o*) See *ante*, p. 138.

(*p*) *Eastern Union Rail. Co. v. Sym-*

*onds* 5 Ex. 237.

(*q*) As to which, see *ante*, p. 790 *et seq.*

(*r*) *Dalton v. Midland Rail. Co.* 12 C. B. 458, and 13 ib. 474.

(*s*) *Ibid.*

As was seen in the chapter on dividends, the non-payment of calls is, in most companies, an answer to an action for dividends; and even where it is not so, calls and dividends may be set off against each other.

Except where an action would lie by one partner against another for money in the hands of the latter payable to the former, an action for a dividend due to a member of an unincorporated company would not lie before the passing of the Judicature acts. (*t*)

\*1036

*\* Of the writ of mandamus.*

Prior to the Common law procedure act, 1854, which greatly enlarged the jurisdiction of the Courts with respect to the issuing of writs of mandamus, it was a rule not to allow a mandamus to go for the purpose of enforcing a mere private right. It was only issued to compel the specific observance of some public duty, for the non-performance of which there was not at law any other adequate remedy. The older cases upon this subject are not, however, so uniform as might be desired; for whilst there was authority for saying that a mandamus would go to an incorporated trading company to compel it to admit persons to offices to which they had been duly elected (*u*), a mandamus has been refused to compel a company to pay a shareholder dividends wrongfully withheld from him (*x*); to compel a company to register a transfer of its stock (*y*); to compel it to produce its books to the shareholders for the purpose of enabling them to consider whether a dividend should or should not be declared paid (*z*); to compel it to make calls for the payment of a debt. (*a*)

The Common law procedure act 1854 (*b*), however, authorizes the issuing of a mandamus to enforce the fulfillment of any duty the fulfillment of which the person applying for the writ is personally interested; and although it has been held that the writ ought not to issue for the purpose of compelling the specific performance of an ordinary

17 & 18 Vict.  
c. 125, § 68.

Where the writ  
will go.

(*t*) See *Lyon v. Haynes*, 5 Man. & Gr. 504.

(*u*) *Anon.* 2 Str. 696; *DaCosta v. Russia Co.* ib. 783; *Com. Dig. Mand. B. 2.*

(*x*) *R. v. Whitstable Co.* 7 East, 353.

(*y*) *R. v. Bank of England*, 2 Doug.

524; *R. v. London Ins. Co.* 5 B. & A. 899.

(*z*) *R. v. Bank of England*, 2 B. & A. 620.

(*a*) *R. v. Victoria Park Co.* 1 Q. B. 288.

(*b*) 17 & 18 Vict. c. 125, § 68.

agreement (*c*), it has been allowed to go to compel a chartered company to register as a shareholder, a person entitled to be so registered by the provisions of the company's deed of settlement. (*d*) It may, therefore, it is conceived, be safely stated that wherever a company refuses to perform a duty imposed upon it by its \*special act, charter, or deed of settlement, or by any general \*1037 statute by which its proceedings are governed, a mandamus to compel it to perform such duty will be issued, whether the duty is public or private. In support of this view it may be observed that, notwithstanding the cases above referred to, modern authorities show that even the prerogative writ of mandamus will go to compel—

The production of a company's register to a creditor. (*e*)

The entry on the register of the probate of the will of a deceased shareholder. (*f*)

The registry of transfers of shares (*g*);

The production to a shareholder, for a proper purpose and at a proper time, of such books as he has a right to inspect (*h*);

The election of directors and officers required to be appointed; (*i*)

The appointment of a public officer by a company empowered to sue and be sued by one (*k*);

The payment by such a company of a debt for which judgment has been obtained against its officer (*l*);

The making of a call for the payment of a creditor having no other remedy (*m*);

These cases clearly show a tendency in modern times to grant a mandamus where formerly it would have been refused. (*m m*) But the granting of a prerogative writ be-

Discretion of  
the court.

(*c*) *Benson v. Paull*, 6 E. & B. 273.

(*d*) *Norris v. Irish Land Co.* 8 E. & B. 512.

(*e*) *R. v. Derbyshire, &c. Rail. Co.* 3 E. & B. 784.

(*f*) *R. v. Worcester Canal Co.* 1 Man. & Gr. 529.

(*g*) See *R. v. Londonderry, &c. Rail. Co.* 13 Q. B. 998; *R. v. Wing*, 16 ib. 645; *R. v. General Cemetery Co.* 6 E. & B. 415, and see *ante*, p. 142.

(*h*) *R. v. Saddlers' Co.* 10 W. R. 87. See, also, *R. v. Wilts, &c. Canal Co.* 3 A. & E. 477, and *R. v. Maraquita, &c. Mining Co.* 5 Jur. N. S. 725, Q. B. In the two last cases, however, the writ

was refused.

(*i*) See *per Tindal, C. J.*, in *Thames Haven Dock Co. v. Rose*, 4 Man. & Gr. 559.

(*k*) See *per Parke, B.*, in *Steward v. Graves*, 10 M. & W. 721.

(*l*) *Corpe v. Glyn*, 3 B. & C. 801; *R. v. St. Katherine Dock Co.* 4 B. & Ad. 360.

(*m*) See *R. v. Victoria Park Co.* 1 Q. B. 238, where the *mandamus* was refused, the creditor being in a position to issue execution against the company, though not to get satisfaction by so doing.

(*mm*) *Paris Skating Rink Co.* 6 Ch. D. 731, shows that a mandamus may be granted by the Chancery Division of the High Court.

ing within certain limits a matter of discretion with the Court, no mandamus is allowed to go unless the applicant has been \*1038 denied the right \*he seeks to enforce (*n*); nor unless he applies for the writ within a reasonable time after such denial (*o*); nor unless the Court is satisfied that its interference is sought for a proper purpose (*p*); nor unless the applicant having a legal right has no other adequate legal remedy. (*q*) The last rule is held to apply to actions for a mandamus under the Common law procedure act, 1854 (*r*); and probably the other rules are also applicable to them. It is worthy of remark, that notwithstanding the tendency to extend the application of the prerogative writ it has very recently been held that such writ only goes to enforce the performance of acts required to be done, and not the undoing of acts already done; and that consequently, although a corporation may be compelled by a mandamus to affix its seal to a document (*s*), it cannot be thus compelled to remove its seal from a document. (*t*) How far this distinction applies to actions under the statute remains to be seen; but it is submitted that the difference between doing and undoing, is, in such a case as that alluded to, a difference in words rather than in substance. Registers of shareholders may be rectified both by inserting names wrongfully omitted and by striking out names wrongfully inserted, as has been seen already. (*u*)

(*n*) *R. v. Wilts, &c. Canal Co.* 3 A. & E. 477.

(*o*) *R. v. Cockermouth Inclosure Commissioners*, 1 B. & Ad. 378.

(*p*) *R. v. Wilts, &c. Canal Co.* 3 A. & E. 477; *R. v. Liverpool, Manchester, &c. Rail. Co.* 21 L. J. Q. B. 284.

(*q*) See *R. v. Chester*, 1 T. R. 396; *R.*

*v. Stafford*, 3 ib. 646; *R. v. Victoria Park Co.* 1 Q. B. 288.

(*r*) *Bush v. Beavan*, 1 H. & C. 500.

(*s*) *R. v. Windham, Cowp.* 377; *R. v. Cambridge*, 3 Burr. 1647; *R. v. York*, 4 T. R. 699.

(*t*) *Ex parte Nash*, 15 Q. B. 92.

(*u*) *Ante*, p. 142.

## \*BOOK IV.

\*1039

## ON THE WINDING-UP OF PARTNERSHIPS AND COMPANIES.

## GENERAL OBSERVATIONS.

THE duration of a contract of partnership, the events which give rise to a dissolution of such contract, and those other events which, without dissolving the contract, confer a right to have it dissolved, were all considered in the eighth chapter of the first book.

In order to wind up the affairs of a dissolved partnership, it is necessary first to pay its debts; secondly, to settle all questions of account between the partners; and, third- Winding up of partnerships. ly, to divide the unexhausted assets (if any) between the partners in proper proportions; or, if the assets are insufficient to pay the debts, then to make up the deficiency by a proper contribution between the partners. This can be done by the partners themselves, or their representatives (*a*); but if disputes arise, then recourse must almost always be had to the Chancery Division of the High Court, for it is under its superintendence only that the assets of a partnership can be properly sold and applied, that the partnership accounts can be satisfactorily taken, and that contribution can be enforced. (*b*)

The consequences of a dissolution of partnership, both as regards creditors and as regards the partners themselves, have been pointed out in earlier parts of the treatise, and Consequences of dissolution. only require to be shortly recapitulated.

I. *As regards the creditors of the firm*, it has been 1. As regards creditors. seen—

(*a*) See *Lyon v. Haynes*, 5 Man. & Gr. 505, where a banking company governed by 7 Geo. 4, c. 46, had been voluntarily dissolved.

(*b*) See book iii. c. 10, § 6.

1. That a dissolution of partnership, whether general or  
1040\* \*partial does not discharge any of the partners from liabilities  
incurred by them previously to the time of dissolution (*e*);

2. That in order that a member of a firm, wholly or partially dissolved, may be freed from his liability to a person who was a creditor of the firm at the time of its dissolution, such creditor must either have been paid, or satisfied, or must have accepted some fresh obligation in lieu of that which existed when the firm was dissolved. (*d*)

3. That (except in a few special cases) (*e*) notice of dissolution or retirement is requisite to determine the responsibility of each partner in respect of such future acts of his late co-partners, as would be imputable to the firm if no change in it had taken place (*f*);

4. That notice of dissolution generally, as by advertisement, is not sufficient to affect an old customer, unless it can be brought to his knowledge (*g*);

5. That notice of dissolution, is notice that the former partners are no longer each other's agents as before (*h*);

6. That after dissolution and notice, partners cease to be responsible for the future acts of each other (*i*), unless they continue to hold themselves out as partners, in which case the notice is of no avail. (*k*)

II. *As regards the partners themselves.* Upon the dissolution of  
2. As regards a partnership, and in the absence of any agreement to  
the partners. the contrary, it has been seen—

1. That each partner has a right to have the partnership assets applied in liquidation of the partnership debts, and to have the surplus assets divided. (*l*)

2. That the right of each partner is to insist on a sale of the partnership assets; there being, in the absence of special circumstances, no right in any partner to have the value of his own or of any co-partner's share determined by valuation, or to have the partnership property, or any portion of it, divided in specie (*m*);

\*1041 \*3. That each partner has a right to insist that nothing further shall be done, save with a view to wind up the concern (*p*);

(*c*) *Ante* p. 417 *et seq.*

(*d*) *Ibid.*

(*e*) *Ante*, p. 403 *et seq.*

(*f*) *Ibid.*

(*g*) *Ante*, p. 415.

(*h*) *Ante*, pp. 403, 406.

(*i*) *Ibid.*

(*k*) *Ante*, p. 409.

(*l*) *Ex parte* Ruffin, 6 Ves. 127.

(*m*) *Ante*, p. 1015.

(*p*) *Wilson v. Greenwood*, 1 Swanst. 481; *Crawshay v. Maule*, ib. 507; *Ex parte* Williams, 11 Ves. 3.

4. That, for the purposes of winding up, the partnership is deemed to continue (*q*); the good faith and honorable conduct due from every partner to his co-partners during the continuance of the partnership, being equally due so long as its affairs remain unsettled (*r*); and that which was partnership property before, continuing to be so for the purpose of dissolution, as the rights of the partners require (*s*);

5. That the right on a dissolution to wind up the partnership affairs, *i.e.*, to get in its credits, convert its assets into money, pay its debts, and divide the residue, belongs as much to one of the late partners as to another; and if they cannot agree amongst themselves, recourse must be had to the Court, which will, if necessary, appoint a receiver, direct a sale of the assets and payment of the partnership debts, and restrain a partner from interfering with the proper winding up of the partnership. (*t*)

6. That the right to wind up the affairs of a dissolved partnership is, however, personal to the members of the late firm; and that, therefore, on the death or bankruptcy of one of them, his executors or trustee will not be permitted to take the management of the affairs of the partnership out of the hands of the other partners (*u*);

7. That if the partnership assets are insufficient to pay the partnership debts, the deficiency must be made good by the partners in proportion to their respective shares (*x*);

8. That after a partnership has been dissolved, any one of the late partners has a right to have that dissolution duly notified, so that a stop may be put to the power of his \*co-partners \*1042 to bind him. (*y*) It seems that he has also a right to restrain them from carrying on business under the old name, if such name is or includes his own; for although their continued use of the old name, even with his knowledge, is not sufficient to render him liable, by virtue of the doctrine of holding out (*z*), such use undoubtedly exposes him to the risk of having actions brought

(*q*) See *ante*, p. 411.

(*r*) *Ante*, p. 569.

(*s*) See *Ex parte Williams*, 11 Ves. 5 and 6; *Crawshay v. Collins*, 2 Russ. 342, 343; *Nerot v. Burnand*, 4 Russ. 247; *Payne v. Hornby*, 25 Beav. 280. See, too, *Ex parte Trueman*, 1 D. & Ch. 464, as to partnership books.

(*t*) See *ante*, book iii. ch. 10, § 6.

(*u*) *Allen v. Kilbre*, 4 Madd. 464; *Ex parte Finch*, 1 D. & Ch. 274; *Fraser v. Kershaw*, 2 K. & J. 496.

(*x*) See *ante*, p. 805.

(*y*) *Troughton v. Hunter*, 18 Beav. 470.

(*z*) *Newsome v. Coles*, 2 Camp. 617.

against him if he still belonged to the firm, and his co-partners have no right to expose him to that risk. (*a*)

9. That each partner has a right to commence a new business in the old line, and in the old neighborhood; either alone, or in partnership with other people. (*b*)

Such, in general terms, are the consequences of dissolution. In order, however, to obtain a complete view of these consequences, it is necessary to attend to the principles upon which partnership accounts are taken; to the distinction between the joint estate of the firm, and the separate estates of the partners composing it; to the doctrines of contribution and indemnity; to the rules which relate to appointing a receiver and granting an injunction; and lastly, to the special agreements, if any, into which the partners may have entered. All these matters were discussed in the third book, and it is not necessary further to allude to them. But the complicated questions which arise in the event of a dissolution by death or bankruptcy, have necessarily been reserved for separate examination, and they will form the subject of the first two chapters of the present book.

The causes and consequences of the dissolution of companies, and the mode of winding up their affairs, have also been reserved for consideration in the present book. The law upon this subject may be properly said to have been developed by legislative enactment from general principles of the law of partnership; and although it is true that many of the principles which govern the dissolution and winding up of partnerships have no application to the dissolution and winding up of companies, still it will be found that others of those principles  
1043\* \*have carefully been preserved, and form the basis on which the statutory law of winding up may truly be said to rest.

Pursuing, therefore, with respect to the present branch of the law, the same method which has been observed with respect to those branches which have already been disposed of, it is proposed first to examine the consequences of death and bankruptcy, both as regards partners and as regards shareholders; and then to pass to the modern statutory enactments relating to the dissolution and winding up of companies, under what are commonly called the Winding-up acts.

(*a*) See *ante*, p. 999.

(*b*) See, as to this, *ante*, p. 854.

## \*CHAPTER I.

\*1044

## OF DEATH AND ITS CONSEQUENCES.

THE consequences of the death of a member of a partnership or company will be most conveniently pointed out in the course of an examination of the position of the surviving members, and of the executors of the deceased member—

1. As between themselves;
2. As regards the creditors of the firm; and
3. As regards the separate creditors and legatees of the deceased.

## SECTION I.—CONSEQUENCES AS REGARDS THE SURVIVING PARTNERS AND THE EXECUTORS OF THE DECEASED.

1. *In the case of ordinary partnerships.*

The death of any one member of a firm operates as a dissolution thereof as between all the members, unless there is some agreement to the contrary (*a*); and the mere fact that the partnership was entered into for a definite term of years, which was unexpired when the death occurred, is not sufficient to prevent a dissolution by such death. (*b*)

Death of a partner dissolves the firm.

Unless all the partners have agreed to the contrary, when one of them dies, his executors have no right to become partners with the surviving partners (*c*); nor to interfere with the partnership business; but the executors of the deceased represent him for all purposes of account,<sup>1</sup> and, unless restrained by special agreement, they have the power, by

Executors of deceased do not become partners.

(*a*) See *ante*, p. 231.

(*c*) *Pearce v. Chamberlain*, 2 Ves. S.

(*b*) *Crawford v. Hamilton*, 3 Madd. 33.

<sup>1</sup> See *ante*, 945, note.

\*1045 \*bringing an action to have the affairs of the partnership wound up in a manner which is generally ruinous to the other partners.<sup>1</sup>

The maxim *jus accrescendi inter mercatores locum non habet*, Jus accrescendi, has been already examined, and need not be again noticed. (*d*)

On the death of a partner the surviving members of the firm are the proper persons to get in and pay its debts. (*e*)<sup>2</sup> But the debts they get in must be placed to the debit

<sup>1</sup> A will provided that the balance of capital due the testator in a firm of which he was member might remain with the surviving partners for a certain time at interest: *Held*, that the executors were barred during that time from recovering the same, and that security could not be required by the court in a suit to which one of the surviving partners was not party. *Vernon v. Vernon*, 7 Lans. 493.

(*d*) *Ante*, p. 664.

(*e*) *Ante*, p. 490.

<sup>2</sup> On a dissolution of a co-partnership by the death of one of the partners, the survivor has a right to take possession of the co-partnership assets, and settle up the affairs of the joint concern: *Marlatt v. Scantland*, 19 Ark. 443; *Allen v. Hill*, 16 Cal. 113; *Tillotson v. Tillotson*, 34 Conn. 335; *Florida Territory v. Redding*, 1 Fla. 242; *Miller v. Jones*, 39 Ill. 54; *Murray v. Mumford*, 6 Cow. 441; *Walker v. House*, 4 Md. Ch. 39; *Dwinal v. Stone*, 30 Me. 384; *Barry v. Briggs*, 22 Mich. 201; *Teigley v. Whitaker*, 22 Ohio St. 606; *Price v. Hicks*, 14 Fla. 565. See *ante*, 665, 666, notes.

A surviving partner having the legal right to the possession of partnership property, the court will not deprive him of that right, unless upon proof of mismanagement, or danger to the partnership effects. *Connor v. Allen*, Harr. Ch. 371.

A sole surviving partner has the entire legal title to all the partnership assets

(see, *ante*, pp. 665, 666, notes). He has a right, acting honestly and with reasonable discretion and diligence, to dispose of them as he pleases, to settle all debts against the concern, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form. *Barry v. Briggs*, 22 Mich. 201.

A surviving partner is entitled to the exclusive possession and control of all the partnership assets, including choses in action, and may assign the latter in the legitimate settlement of the partnership business, notwithstanding such partnership and its individual members may be insolvent. *Willson v. Nicholson*, 61 Ind. 241. See, also, *Roys v. Villas*, 18 W. c. 169; *Pinckney v. Wallace*, 1 Abb. Pr. 82.

See, however, *Hill v. Treat*, 67 Me. 501; *Cook v. Lewis*, 36 id. 340; *Cavitt v. James*, 39 Tex. 189; *Mutual, &c., Institution v. Euslin*, 37 Mo. 453.

In an action by the assignee on a chose in action of an insolvent partnership, which has been assigned by a surviving partner, it is presumed, where the contrary does not appear that such assignment was made in the *bona fide* settlement of the partnership business; and where in such action creditors of the insolvent partnership apply to be made parties to the action and file a counter-claim asking application of the proceeds of such chose in action to the payment of their debts, and the counter-claim

of the late firm, and the debts they pay must be placed to its credit. Whilst, therefore, the executors of the deceased partner are entitled to have payments made to the survivors by a debtor to

does not allege that such assignment was made in bad faith, in which the assignee participated, it is insufficient and may be struck out on motion. *Willson v. Nicholson*, 61 Ind. 242.

The sole survivor of a firm may assign a promissory note, payable to the late firm, by indorsement, so as to vest the legal title in the assignee, as effectually as if the note had been made payable to him. *Johnson v. Berlzheimer*, 84 Ill. 54. See *Cavitt v. James*, 39 Tex. 189.

A surviving partner has the right to apply partnership funds to release real estate of the firm from incumbrance, and to fulfill contracts for the purchase of real estate. *Shearer v. Shearer*, 98 Mass. 107.

A surviving partner cannot bind the firm, nor transfer the partnership effects to pay a debt of his own, nor pay the debt of one firm of which he is survivor with the debt of another firm of which he is survivor; but he may transfer the assets of a firm of which he is survivor to pay the debts of that firm. *Scott v. Tupper*, 16 Miss. 280.

After the death of one partner, an assignment of the partnership funds, by the surviving partner, for the payment of a separate debt of the deceased partner in preference to the partnership debts, is void. *Hutchinson v. Smith*, 7 Paige, 26. See, *ante*, *Assignments*.

The surviving member of a firm may give preferences among the partnership creditors, under his general authority to wind up the business of the firm. *Loeschigk v. Hatfield*, 5 Robt. 26; 4 Abb. Pr. N. S. 210. See, however, *Barcroft v. Snodgrass*, 1 Cold. 430. See, *ante*, *Assignments*.

The surviving partners have power to sell and convey the firm real estate, without regard to whether this be neces-

sary to pay debts. *Solomon v. Fitzgerald*, 7 Heisk. 552.

A surviving partner cannot bind co-survivors by signing the firm name without their express authority or ratification. *Jeness v. Carleton*, 40 Mich. 343; *Matteson v. Nathanson*, 38 id. 377; *Castle v. Reynolds*, 10 Watts, 51 (a judgment note); *Bank of Port Gibson v. Baugh*, 17 Miss. 290. See, however, *Dundass v. Gallagher*, 4 Pa. St. 205.

A surviving partner and liquidator cannot release the partnership's recourse for accommodation acceptances against a party, so as to make him a competent witness. *Bookout v. Anderson*, 2 La. Ann. 246.

Delivery by the surviving partner of a note then assets of the firm, which had been indorsed in the name of the firm by the deceased partner in his lifetime, is not sufficient to pass the legal title to the purchaser. *Glasscock v. Smith*, 25 Ala. 474.

A surviving partner cannot bind the estate of a deceased member of the firm for debts incurred by him subsequently to its dissolution by the death of such member. *Cook v. Carson*, 45 Tex. 429.

Where a lease to a co-partnership gives a privilege to the lessees of continuing the lease for an additional term, upon giving notice of their intention to continue, prior to the termination of the original term, in case of the death of one of the partners the survivor can, as such, give the required notice and enforce a fulfillment of the covenants of the lease for the extended term. *Betts v. June*, 51 N. Y. 274.

If goods shipped and consigned to a firm doing a commission business, to be sold on account of the shipper, are received, but before they are sold one of the partners dies, the survivor may sell

the old firm, applied in payment of his debt to it (*f*) the survivors have a right, if they pay more than their share of the debts of the old firm, to be reimbursed out of the estate of their deceased co-partner. (*g*) They are creditors against that estate for what

such goods, and in such case, the claim of the shipper on account of such sale is properly against the firm, and not against the survivor individually. *Ofutt v. Scott*, 47 Ala. 104.

Where there is an executory agreement between partners for the sale of the firm assets to one of them, unaccompanied by any actual transfer, and the purchasing partner dies before the time fixed for the delivery, firm assets subsequently found in the hands of the surviving partner, who is also executor of the deceased, will be presumed to be held by him in his character of surviving partner, and not as executor. *Kreis v. Gorton*, 23 Ohio St. 468.

A agreed with a surviving partner that if he would apply the firm property to the decedent's private debts, A would pay the firm debts. The agreement was held good in a suit thereon against A by the survivor, and the amount to have been paid by A was the measure of damages against him. *Weddle v. Stone*, 12 Ind. 625.

A surviving partner, who administers upon the partnership affairs, may be allowed a credit on his inventory for a debt due by the deceased partner to the firm, and for a debt due by himself to the firm at the same time, both debtors appearing insolvent; and he is not required to class the partnership debts and pay them *pro rata*, but may pay them all in full; as section 63 of article 1 of the administration act does not apply to him. *Crow v. Weidner*, 36 Mo. 412.

In New York, under section 244 of the Code of Procedure, as amended in July, 1851, a partner, who by his answer admits that he has in his hands partner-

ship funds, which on his statement appear to belong to the administrators of his deceased partner, will be ordered to pay over such funds to them, although there are outstanding contested claims against the firm, and it has claims to enforce which will require time and disbursements. *Roberts v. Law*, 4 Sandf. 642.

Where one partner dies insolvent, and is, at the time of his death, indebted, individually, to the surviving partner, individually, and the surviving partner afterwards collects funds of the partnership, he cannot apply the share of the deceased partner to the individual debt due to himself; such share must be paid to the representative of the deceased partner to be applied to his debts. *Moffat v. Thomson*, 5 Rich. Eq. 155.

Under the provisions of N. H. Gen. Stat. ch. 106, upon the death of either partner, the co-partnership affairs may be fully adjusted and settled in the probate court, either by the surviving partner, or the representative of the deceased partner, or by arbitration. But if not thus settled, they may be adjusted in a court of equity the same as before such statute was enacted. *Scott v. Buffom*, 52 N. H. 345.

A surviving partner has no right to use machinery upon his own personal account to the detriment of the estate of the deceased partner, and will be enjoined, whether the machinery is regarded as realty or personalty. *Stanhope v. Suplee*, 2 Brewst. 455.

Where the surviving partner of a firm collected demands of the firm in Confederate money, he was held liable to account to the representatives of the de-

(*f*) *Lees v. Laforest*, 14 Beav. 250.

(*g*) *Musson v. May*, 3 V. & B. 194.

may be due to them from their deceased partner, on taking the partnership accounts, and they may as creditors bring an action for the administration of his estate. (*h*) If he has no legal personal representative, the Probate division of the High Court will grant a limited administration to a nominee of the surviving partners, so as to enable them to institute proceedings to have the partnership accounts properly taken. (*i*)

A surviving partner, if a creditor of the deceased, may sue either in that character for a common administration judgment, or, in the character of a partner, for a judgment for a partnership account, and for payment of what is due on that account; and if assets are not admitted, then for a judgment for the administration of the estate of the deceased. An action in the alternative may, it is conceived, now be sustained. (*j*) The legal personal representative of the deceased must be a party if an account of his estate is sought. If there is no such representative, but the assets of the deceased or of the partnership are in danger, and the object of the plaintiff is to have them

Actions by surviving partners against the executors of a deceased partner.

ceased partner in lawful money, it being his duty to have collected in lawful money. Succession of Wilder, 21 La. Ann. 371.

Where one of two partners dies, the survivor is entitled to the possession and disposition of all the partnership property, and in a suit by him instituted for the purpose of closing up the affairs of the co-partnership, and to recover from the estate of the deceased partner any amount due him from the deceased, it will be improper to include in a decree in favor of the survivor any amount invested by the partners in real or personal property, unless such property had been disposed of by the deceased partner, or for his use, in his lifetime. The fact that the title to land purchased by partners with partnership funds, was taken in the name of the wife of one of the partners, since deceased, or that any of the property of the co-partners has been disposed of by the widow, or that she has collected money due on partner-

ship accounts, affords no ground for charging the estate of the deceased partner at the suit of the survivor. A surviving partner cannot charge the estate of the deceased partner for a share of the earnings of the co-partnership which remain in open account against their customers, or which were not paid to or realized by the deceased in his lifetime. Price v. Hicks, 14 Fla. 565.

(*h*) See Robinson v. Alexander, 2 Cl. & Fin. 717; Addis v. Knight, 2 Mer. 119. If the deceased has pledged his real estate to his co-partners for a debt due from him to them, they cannot enforce their security in the absence of his legal personal representative. Scholefield v. Heafield, 7 Sim. 667.

(*i*) Cawthorne v. Chalie, 2 Sim. & Stu. 127. The Court of Chancery would not in such a case appoint a person to represent the estate of the deceased. Rowlands v. Evans, 33 Beav. 202.

(*j*) Ord. xvi. r. 6.

protected, he should confine his claim for relief accordingly, and not seek for an account. (*k*)

In the absence of an express agreement to that effect, the surviving partners have no right to take the share of the deceased partner at a valuation;<sup>1</sup> nor to have it ascertained in any other manner than by a conversion of the partnership assets into money by a sale (*l*); nor have they any right of preemption. (*m*) Even the good-will of the business, if saleable, must be sold for the benefit of the estate of the deceased; although the surviving partners are under no obligation to retire from business themselves, and cannot, it seems, be prevented from recommencing business together in the name of the old firm unless the good-will has been sold. (*n*)

In ascertaining the share of the deceased, the surviving partners must not only bring into account the assets of the firm which actually existed at the time of his death, but also whatever has been obtained by the employment of those assets up to the time of the closing of the account; for so long as profits are made by the employment of the capital of the deceased partner, so long must such profits be accounted for by the surviving partners. (*o*) The executors of the deceased have, however, the option of taking interest at 5% per cent. (*p*)<sup>2</sup>

On the other hand, the surviving partners are entitled, if they carry on the business for the benefit of the estate of the deceased partner, to an allowance for so doing;<sup>3</sup> unless

(*k*) *Rawlings v. Lambert*, 1 J. & H. 458. Under the new practice a claim for an account would probably be harmless.

<sup>1</sup> See *Ogden v. Astor*, 4 Sandf. 311.

(*l*) *Crawshaw v. Collins*, 15 Ves. 226, 229; *Featherstonhaugh v. Fenwick*, 17 Ves. 308. See, as to unsaleable assets and pending contracts, *ante*, p. 1018.

(*m*) *Brown v. Gellatly*, 31 Beav. 243.

(*n*) See *ante*, p. 854 *et seq.*

(*o*) See *ante*, p. 976.

(*p*) *Ante*, p. 983.

<sup>2</sup> If the survivors of a partnership carry on the concern and enter into new transactions with the partnership funds, they do so at their peril, and the representatives of a deceased partner may elect to call on them for the capital with a share of the profits or with inter-

est. If no profits were made or even if a loss is incurred, they must be charged with interest on the funds they use and they must bear the whole loss. *Brown's* appeal, 89 Pa. St. 139; *Goodburn v. Stevens*, 1 Md. Ch. 420; *Millard v. Ramsdell*, Harr. Ch. 373. See, also, *Ogden v. Astor*, 4 Sandf. 311.

But profits cannot be claimed for one period and interest for another. *Goodburn v. Stevens*, *supra*.

Where the interest of the deceased partner had become vested in one of the surviving partners, who consented to the continuance of the co-partnership, the rule first above stated was held not to apply. *Millard v. Ramsdell*, *supra*.

<sup>3</sup> *Griggs v. Clark*, 23 Cal. 427; *Newell v. Humphrey*, 37 Vt. 265.

they are also his executors, in which case they can make no charge for their trouble. (q)

The right of the executors as against the surviving partners is, simply, to have the share of the deceased ascertained and \*paid; but this frequently cannot \*1047 be done without a general sale and winding up of the partnership.

Position of the executors of the deceased.

A *bonâ fide* sale, however, by the executors to the surviving partners can generally be made with safety if no surviving partner is an executor. (r)<sup>1</sup> Where, however, a sale of the share of the

Where the business of a trading partnership is continued for a considerable time after the death of one of the partners, whose personal representative, in seeking a settlement of the partnership accounts in equity, elects to have a report and decree for the profits which accrued during that time, the surviving partner is entitled, at least, to an allowance and deduction for "tavern bills and other expenses incurred in the adjustment and settling up the affairs of the partnership." *Oreilly v. Brady*, 28 Ala. 530.

Where plaintiff and decedent were partners, and plaintiff paid debts and performed other services in winding up the affairs of the firm, commissions were allowed on money collected and interest on the decedent's share of moneys advanced by the plaintiff, it having been agreed that he should collect "at the proper cost and charges of the two" individually. *Wood v. Wood*, 26 Barb. 356.

The natural tutor who supervises the interest of his minor child in the liquidation of a partnership of which the deceased mother of the minor was a partner, cannot claim for services rendered the partnership; he has only a claim against his ward in his account of tutorship. *McMichael v. Raoul*, 14 La. Ann. 307.

(q) *Ibid*.

(r) See *infra*, § 3.

<sup>1</sup>An administrator of a deceased partner has power to settle with the surviving partners on such terms as in the exercise of good faith and reasonable diligence he may choose to accept. He is the personal representative of the deceased partner, and has all his powers of settlement except that being trustee for the next of kin, he cannot give away anything. *Hoyt v. Sprague*, 12 Chicago Leg. News, 25; *Sage v. Woodin*, 66 N. Y. 578.

Such settlement is conclusive upon the parties and upon all persons claiming through them, including the creditor of the deceased partner. *Sage v. Woodin*, *supra*.

A *bonâ fide* agreement by the administrators of a member of a partnership for buying and selling land, to relinquish the deceased partner's right, in an executory contract to buy some land, to the surviving partner, rather than pay their share of the price then coming due, will be valid, and will not be overthrown after a lapse of time at the application of the heirs of the deceased partner. *Ludlow v. Cooper*, 4 Ohio St. 1.

Money belonging to a firm, placed in bank in the name of the firm by a partner who is an executor of the deceased partner, and by him checked out in payment of debts of the firm, with his co-executor's consent, will, as to the payees, be considered as firm assets,

deceased cannot be effected by private arrangement, the executors must enforce a general sale and winding up for their own safety, unless the persons interested in the estate of the deceased assent to the adoption of some other course. And even if they do, it must not be forgotten that the executors may not be able, without risk to themselves, to continue the share of the deceased in the business, and take the profits accruing in respect of it; for by sharing profits made after the death of the deceased, the executors, although they are only trustees for others, may become liable as partners with the surviving partners; and may therefore become liable to be adjudicated bankrupt and to be compelled personally to pay debts contracted in carrying on the business. (s) The position of the executors of a deceased partner is, in fact, often one of considerable hardship and difficulty; if they insist on an immediate winding up of the firm, they may ruin those whom the deceased may have been most anxious to benefit; whilst if for their advantage the partnership is allowed to go on, the executors may run the risk of being ruined themselves. With a view to obviate this, it

Effect of making a co-partner an executor.

is not unusual for one partner to make his co-partner his executor; but the difficulty of the executor's position is thus rather increased than diminished; for his

own personal interest as a surviving partner is brought into direct conflict with his duty as an executor. Everything therefore which he does is liable to question and misconstruction on the part of the persons beneficially entitled to the estate of the deceased; and he is practically much more fettered in the discharge of his duties, and

in the exercise of his rights, than if he had not to act in the

\*1048 double character \*imposed upon him. (t) This will appear in the section in which it is proposed to examine the rights of the separate creditors and legatees of the deceased against his executors and his surviving partners.

Where a deceased partner's estate is administered under the decree of the Court, his executors, if they act properly, are personally protected from all consequences, and no

Actions for indemnifying executors.

notwithstanding a private agreement between the executors that it belonged to the estate. *Kreis v. Gorton*, 55 Mo. 468.

(s) Formerly they always did incur this liability. See *Ex parte Holdsworth*, 1 M. D. & D. 475; *Wightman v. Townroe*, 1 M. & S. 412; *Ex parte Garland*,

10 Ves. 119. But see now *Holme v. Hammond*, L. R. 7 Ex. 218, noticed *ante*, p. 40.

(t) See some general remarks on this subject in *Hutton v. Rossiter*, 7 DeG. M. & G. 12.

action can be sustained against them in respect of which they so do. (u) If there are liabilities which will have to be met, the Court will order part of the assets to be set aside to meet them when they arise. (x) But if the liabilities are remote and contingent, and may possibly never arise at all, the utmost that the executors can obtain in the shape of indemnity, in addition to that afforded by the orders of the Court itself, is a covenant from the testator's legatees or next of kin. (y)

No succession duty is payable by surviving partners on the death of a member of the firm, even although they may benefit thereby. (z)

Succession  
duty.

## 2. *In the case of companies.*

The position of the executors of a deceased shareholder relatively to the company will, after the foregoing observations, be readily understood.

Executors of  
shareholders.

1. The executors are entitled to be paid by the company whatever is payable by it in respect of the shares of the deceased at the time of his death; and also whatever becomes payable in respect of those shares whilst they form part of his estate.

2. The assets of the deceased are liable to make good whatever is at the time of his decease payable by him to the company, and also whatever afterwards becomes payable by his representatives by virtue of the contract into which he entered. \*Consequently, if a person becomes a shareholder \*1049 in a company and then dies, and afterwards, and whilst his shares are part of his estate, a call is made by the company on its shareholders, his assets will be liable to the payment of such call. (a) Moreover, a call made by a company in pursuance of its act, charter, or deed of settlement, constitutes a specialty debt (b);

Liability to  
calls, &c.

(u) *Waller v. Barrett*, 24 Beav. 413.

(x) *Fletcher v. Stevenson*, 3 Ha. 360;  
*Brewer v. Pocock*, 23 Beav. 310.

(y) See *Dean v. Allen*, 20 Beav. 1;  
*Waller v. Barrett*, 24 ib. 413; *Addams v. Ferick*, 26 Beav. 384; *Bennett v. Lytton*, 2 J. & H. 155.

(z) *Oldfield v. Preston*, 3 DeG. F. & J. 398.

(a) See, in equity, *Fyler v. Fyler*, 2

Ra. Ca. 813; *Blakeley's case*, 13 Beav. 133, and 3 Mac. & G. 726; *Heward v. Wheatley*, 3 DeG. M. & G. 628, and at law, *Wills v. Murray*, 4 Ex. 843. Compare *Weald of Kent Canal Co. v. Robinson*, 5 Taunt. 801.

(b) *Cork and Bandon Rail. Co. v. Goode*, 13 C. B. 826. In *Morris v. Sadlier, Jr.* L. R. 6 Eq. 580, a covenant by a deceased shareholder with an officer of the com-

and all calls made under the winding up provisions of the Companies act, 1862, are also specialty debts. (c) But specialty debts are no longer entitled to priority of payment over simple contract debts (d); and even before the law was altered in this respect, executors who paid the simple contract debts of their testator before a call was made, were allowed those payments as against the company seeking to make them liable for a *devastavit* (e); and no part of the testator's assets could, as against his simple contract creditors, be set apart for the payment of calls which had not been made. (f)

3. It follows from the foregoing observations, that when a company is being wound up, the executors of a deceased shareholder are liable to be made contributories as executors in respect of his shares so long as they remain untransferred. From this again it follows, that the executors of a deceased shareholder are entitled to petition for an order to wind up the company, although they may not be themselves shareholders therein. This subject will be alluded to hereafter. (g)

4. In most companies executors have, as between themselves and the company in which their testator was a shareholder, a right to become shareholders in his stead. But if an executor does become a shareholder, his liability, as well to the company as to its creditors, is a personal liability; and such liability is in no way qualified or limited by the circumstance that as between himself and those who are beneficially entitled to the testator's assets, the executor is not the owner of the shares standing in his name. (h) Executors, therefore, should not become shareholders if they can avoid doing so; and generally it will be found that they can transfer their testator's shares without first becoming shareholders themselves. Whether, however, this can or cannot be done, and the manner in which it is to be done, depend, in each case, upon the constitution of the company in which the shares are held. By the Companies

pany to pay what should be demanded of him, was held not to create a specialty debt in respect of moneys due from his estate, but not demanded in his lifetime.

(c) The Companies act, 1862, § 16. It was not so under the older winding up acts. See Robinson's Executors' case, 6 DeG. M. & G. 572.

(d) 32 & 33 Vict. c. 46.

(e) *Henderson v. Gilchrist*, 17 Jur. 570.

(f) *Wentworth v. Chevell*, 3 Jur. N. S. 805. As to the legatees and next of kin, see *supra*.

(g) See *infra*, the section on winding up.

(h) See Spence's case, 17 Beav. 203; Fenwick's case, 1 DeG. & S. 557; Armstrong v. Burnet, 20 Beav. 424.

act, 1862, provision is expressly made for transfers by executors, although they may not themselves be members. (i) The transfer by executors of shares in companies governed by the Companies Clauses consolidation act, is also specially provided for (k); but by this act the executors must apparently be themselves registered as shareholders before they can transfer. (l)

## SECTION II.—CONSEQUENCES AS REGARDS JOINT CREDITORS.

### 1. *In the case of ordinary partnerships.*

#### a. *With reference to what occurred before death.*

The position of the executors of a deceased partner, with reference to the creditors of the firm, has, to a considerable extent, been already ascertained. For it has been seen:—

Position of executors of deceased partner as regards creditors of the firm.

1. That, notwithstanding the death of a partner, his estate is liable to the creditors of the firm; and not only in respect of debts contracted in his lifetime, in the ordinary way of \*business, but also in respect of debts arising from breaches \*1051 of trust committed in his lifetime by himself or his co-partners, and imputable to the firm (m);<sup>1</sup>

2. That this liability cannot be got rid of by any arrangement between the executors of the deceased and the surviving partners; and that, notwithstanding subsequent dealings between the creditors and the surviving partners, the liability of the executors continues, until it can be shown that the creditors have abandoned their right to obtain payment from the estate of the deceased, or that their demands have, in fact, been paid or discharged (n);

3. That this liability does not extend to ordinary torts, for as to them *actio personalis moritur cum persona*. (o)

(i) 25 & 26 Vict. c. 89, § 24, and see Table A, Nos. 12–16. The Table B. of the Companies act, 1856, contained similar provisions.

(k) 8 & 9 Vict. c. 16, §§ 18, 19, 20.

(l) Compare §§ 3, 14, 18.

(m) *Ante*, p. 369 *et seq.*

<sup>1</sup> See *post*, 153, note.

(n) *Ante*, p. 435 *et seq.*

(o) *Ante*, p. 373 *et seq.* The 3 and 4

Wm. 4, c. 42, § 2, gives a remedy against the executors of a person who commits a tort within six months of his death, provided such tort affects the real or personal property of the person injured. As to frauds, see *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; *Peek v. Gurney*, 13 Eq. 79; *Davidson v. Tulloch*, 3 McQu. 783.

These propositions have been already so fully illustrated in various portions of the present treatise, that it is unnecessary here to do more than collect the cases establishing them.

Estate of  
deceased  
discharged

1. *Cases in which by death alone a partner's liability has been extinguished:—*

Sumner v. Powell, 2 Mer. 30, and Turn. & R. 423 (*ante*, p. 372).  
 Clarke v. Bickers, 14 Sim. 639 (*ante*, p. 372).  
 Wilmer v. Currie, 2 DeG. & Sm. 347 (*ante*, p. 373).  
 Hill's case, 20 Eq. 585. Joint holders of shares.

Estate of  
deceased not  
discharged.

2. *Cases in which the estate of a deceased partner has been held liable (p):—*

*Liability in respect of contracts.*

Beresford v. Browning, 20 Eq. 564 (*ante*, p. 370).  
 Lane v. Williams, 2 Vern. 292.  
 Simpson v. Vaughan, 2 Atk. 31.  
 Darwent v. Walton, ib. 570.  
 Clavering v. Wesley, 3 P. W. 402.  
 \*1052 \*Bishop v. Church, 2 Ves. S. 100 and 371 (*ante*, p. 370).  
 Jacomb v. Harwood, ib. 265.  
 Burn v. Burn, 3 Ves. 573 (*ante*, p. 371).  
 Thomas v. Frazer, 3 Ves. 399.  
 Orr v. Chase, 1 Mer. 729.  
 Harris v. Farwell, 13 Beav. 403.  
 Devaynes v. Noble, 1 Mer. 539, and 2 R. & M. 495.  
 Wilkinson v. Henderson, 2 M. & K. 583.  
 Thorpe v. Jackson, 2 Y. & C. Ex. 553.  
 Hills v. McRae, 9 Ha. 297.  
 Brett v. Beckwith, 3 Jur. N. S. 31, M. R. (*post*, p. 1055).  
 Cheetham v. Crook, McCl. & Y. 307.

*Liability in respect of frauds and breaches of trust.*

New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73 (*ante*, p. 583).  
 Blair v. Bromley, 2 Ph. 354 (*ante*, p. 305).  
 Sadler v. Lee, 6 Beav. 324 (*ante*, p. 304).  
 Vulliamy v. Noble, 3 Mer. 619.  
 Devaynes v. Noble.  
 Clayton's case, 1 Mer. 576 (*ante*, pp. 304, 431).  
 Baring's case, ib. 612 (*ante*, p. 304).  
 Ward's case, ib. 624.

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(p) See the celebrated judgment in R. & M. 495.  
 Devaynes v. Noble, 1 Mer. 539, and 2

3. *Cases in which the estate of a deceased partner has been held liable, notwithstanding dealings between the creditors of the firm and the surviving partners:—*

Estate of deceased not discharged by what has occurred since his death.

Devaynes v. Noble.

Sleech's case, 1 Mer. 539.

Clayton's case, ib. 579 (*ante*, pp. 304, 431).

Palmer's case, ib. 623.

Braithwaite v. Britain, 1 Keen, 206.

Winter v. Innes, 4 M. & Cr. 101 (a very important case).

Harris v. Farwell, 15 Beav. 31 (*ante*, p. 446).

Daniel v. Cross, 3 Ves. 277.

Jacomb v. Harwood, 2 Ves. S. 265.

4. *Cases in which the estate of a deceased partner has been held discharged by what has taken place between the creditor and the surviving partners:—*

Estate of deceased not discharged by what has occurred since his death.

*By general dealings.*

Oakley v. Pasheller, 10 Bli. 548, and 4 Cl. & Fin. 207 (*ante*, p. 447).

Brown v. Gordon, 16 Beav. 302 (*ante*, p. 448).

Wilson v. Lloyd, 16 Eq. 60; which cannot, however, be relied on, (see *ante*, pp. 435, 447).

\**By payment.*

\*1053

Devaynes v. Noble.

Clayton's case, 1 Mer. 572 (*ante* p. 422).

Merriman v. Ward, 1 J. & H. 371. This case is important as showing that where a debt of a deceased partner has been discharged by the application of the rule in Clayton's case, it is not competent for his executors to revive such a debt against his estate.

The estate of a deceased partner may be discharged by the statute of limitations; and now, by the Mercantile law amendment act payments by the surviving partners will not keep alive the creditor's claim against the executors of the deceased. (*q*) The effect in equity of such payments before the

Statute of limitations.

(*q*) 19 & 20 Vict. c. 97, § 14. See Thompson v. Waithman, 3 Drew. 628, which, although wrong as regards the

retrospective operation of the act (Jackson v. Woolley, 8 E. & B. 778), is in other respects correct, *ante*, p. 459.

passing of the act in question was by no means clearly settled (*r*); but whatever doubt there may formerly have been upon the subject, it was clearly settled before the Judicature acts that a creditor of the firm could proceed against the estate of a deceased partner without first having recourse to the surviving partners, and without reference to the state of the accounts between them and the deceased. (*s*)<sup>1</sup> But

Right of creditor of firm to be paid out of the estate of a deceased partner.

(*r*) Compare *Winter v. Innes*, 4 M. & Cr. 101, and *Braithwaite v. Britain*, 1 Keen, 206, with *Way v. Bassett*, 5 Ha. 55, and *Brown v. Gordon*, 16 Beav. 302. See, also, *ante*, p. 457.

(*s*) *Wilkinson v. Henderson*, 1 M. & K. 582; *Devaynes v. Noble*, 2 R. & M. 495; *Thorpe v. Jackson*, 2 Y & C. Ex. 553.

<sup>1</sup> Except in case of death of a co-partner, creditors of a partnership can enforce their claims, which are purely legal, against the property of the partnership, only at law. *Parish v. Lewis*, 1 Freem. (Miss.) Ch. 299.

The death of one partner is not alone sufficient to entitle a creditor of the partnership to go into chancery to enforce the collection of his debt. *Pearson v. Keedy*, 6 B. Mon. 128.

The estate of a deceased partner cannot be pursued, in law or equity, while the surviving partner is solvent. *Alsop v. Mather*, 8 Conn. 584; *Troy Iron & Nail Factory v. Winslow*, 11 Blatchf. 513. See, *ante*, 665, note.

It is, however, in equity liable for partnership debts, if the surviving partner be insolvent. *Caldwell v. Stileman*, 1 Rawle, 212; *Sale v. Dishman*, 3 Leigh, 548; *Storer v. Hinkley*, Kirby, 147; *Stahl v. Stahl*, 2 Lans. 60; *Philson v. Bampffield*, 1 Brev. 202; *Emanuel v. Bird*, 19 Ala. 596. See, *ante*, 665, note. See *Waldron v. Simmons*, 28 Ala. 629; *Freeman v. Stewart*, 41 Miss. 138; *McLain v. Carson*, 4 Ark. 164.

A partnership creditor recovered judgment on his claim against the surviving partner, who died, and his administra-

tors exhausted his personal assets in paying other debts; whereupon he filed a bill against such administrators and the heirs of the surviving partner, and made the representatives of the deceased partner, parties, to subject the land possessed at his decease by the surviving partner, some of which belonged to the firm, in the first instance, and then to charge the representatives of the partner who first deceased: *Held*, that equity had jurisdiction in the case, and that the representatives of the deceased partner were properly made parties. *Jackson v. King*, 8 Leigh, 689.

Administrators of A brought a bill to foreclose a mortgage made by B, a late partner of A, to the administrators to secure an individual debt between them, and also to secure to A's estate the share of the property of the firm the business of which B had undertaken to settle up: *Held*, that this mortgage belonged to A's estate, and that the firm creditors were not entitled to have the proceeds of it, while B was solvent. *Wimpee v. Mitchell*, 29 Ga. 276.

A claim on a judgment recovered against a surviving partner can be enforced against the estate of the deceased partner in equity only, and must, therefore, be subject to such equitable rules as obtain in reference to the payment of partnership and individual debts. *Weyer v. Thornburgh*, 15 Ind. 124.

M. and P. were in partnership as attorneys at law. The firm received and receipted for claims for collection by suit or otherwise. Suits were instituted and judgments recovered upon them in the

it was necessary to make the surviving partners parties to the suit, for they were interested in the issues raised between him and the executors. (*t*)

lifetime of M.; and after his death the money was collected by P., but was not paid to the claimants. P. subsequently died insolvent. There were no assets of the firm of M. and P. to be applied to the payment of the claims: *Held*, that the separate estate of M. was liable for their payment. *McGill v. McGill*, 2 Mete. (Ky.) 258. See, also, *Hebertson v. Jepherson*, 10 Pa. St. 124.

The creditor of a partnership cannot proceed in equity against the estate of a deceased partner without first exhausting his remedy at law against the surviving partners, or showing that legal process against them would be unavailing. *Slatter v. Carroll*, 2 Sandf. Ch. 573; *Lawrence v. Trustees*, 2 Den. 577; *Voorhis v. Child*, 17 N. Y. 354; *Copcutt v. Merchant*, 4 Bradf. 18. See *Nelson v. Hill*, 5 How. 127; *Fillyall v. Laverty*, 3 Fla. 72; *Postlewait v. Howes*, 3 Iowa, 365; *Creswell v. Blank*, 3 Grant Cas. 320; *Moore's Appeal*, 34 Pa. St. 411; *Maxey v. Averill*, 2 B. Mon. 107.

Where a surviving partner is insolvent, it is not necessary to obtain a judgment against him before proceeding against the equitable assets of a deceased partner's estate. *Vance v. Cowing*, 13 Ind. 460. See, also, *Horsey v. Heath*, 5 Ohio, 353.

Where one of two partners dies, and judgment is recovered against the surviving partner for a partnership debt, and he becomes a bankrupt before the judgment is satisfied, the executors of the other may be compelled in chancery to make satisfaction. *Storer v. Hinkley*, *Kirby*, 147.

Upon the dissolution of a partnership, the debts due the partnership were assigned to one of the partners, who afterwards died, and the surviving partner removed out of the State, and his residence was unknown to the representatives of the deceased partner: *Held*, that they might come into equity to recover the debts. *Drake v. Blount*, 2 Dev. Eq. 353.

A sheriff's return on an execution against two surviving partners of *nulla bonâ*, that he could not find one either in his precinct or the State, and that the other was too sick to be committed to jail without danger of life, shows a sufficient compliance with the statute prescribing that surviving partners shall be pursued to final judgment and execution, before a claim against the firm shall be valid against a representative of a deceased co-partner. *Shaw v. Knowles*, 3 R. I. 112.

An accommodation indorser of the note of a firm, after the death of one of the partners, indorsed a new note in the same capacity, made by the surviving partner and the administratrix of the deceased partner, for the purpose of continuing the same indebtedness, the first note being taken up; the holder of the second note recovered judgment thereon against the indorser who satisfied the same, and filed his bill to charge the estate of the deceased partner, upon the allegation that the makers of the note were insolvent: *Held*, that the estate of the deceased was relieved from the payment of the debt, and that the only equity of the complainant in his estate was to subject the interest of the

(*t*) See, in addition to the cases in the last note, *Hills v. McRae*, 9 Ha. 297; *Devaynes v. Noble*, *Sleech's case*, 1 Mer. 539; *Stephenson v. Chiswell*, 3 Ves. 566.

As to the plaintiff availing himself of the equities subsisting between the defendants, see *ante*, note (*r*).

The right of a creditor of a firm to institute a suit for the administration of the estate of a deceased member of the firm, and for payment of his debts, joint as well as separate, was plain. (u) If

Creditor's suit for administration of deceased partner's estate.

\*1054 \*a suit had already been instituted for the \*administration of the estate of the deceased, a creditor of the firm could go in and prove

against the estate without being compelled to take any preliminary steps himself. (x) If he had to institute a suit himself, he could

surviving partner, and the administratrix therein, to the payment of his debt. *Brown v. Lang*, 4 Ala. 50.

The laches of a creditor of a partnership will bar his remedy against the estate of a deceased partner, but what shall amount to laches in prosecuting his claim will depend upon the circumstances of each particular case. *Jackson v. King*, 12 Gratt. 499.

A, B and C being partners in a manufacturing business, A made his will, by which he directed his interest in this establishment, viz: the buildings, machinery, stock, privileges and profits thereof, to be continued therein, for the term of four years after his decease; and that at the expiration of that term, this property and the profits accruing thereon, together with all the testator's other estate, real and personal, should be divided and distributed to D and others. B, the executor of A, after A's death, carried on the business in the partnership name, for the term specified. It proved to be a losing concern. A large sum was due from A's estate to the company beyond his share of the partnership property. A large sum was also due from the company to C, who had paid a part, and would be obliged to pay the residue, of the outstanding debts of the company, which were considerable in amount, B having failed and absconded. Previous to the expiration of the four years, the time limited by the court of probate for the exhibition of claims against the estate of A, had expired, and the executor had pro-

ceeded in the settlement of the estate without reference to the partnership fund, and had caused distribution to be made according to the provisions in the will. On a bill in chancery, brought by C against the executor and devisees of A, seeking satisfaction of his claims out of the general assets of A, it was held, 1, that the partnership creditors had no lien on the estate in the hands of the devisees, by reason of their right to participate, eventually, in the profits of the trade; 2, that the general assets were not liable to the plaintiff's claim, by virtue of the testator's last will; and 3, that the plaintiff's remedy was not in chancery, but by a demand on the executor, to be pursued like other claims of a general nature against the testator's estate. *Pitkin v. Pitkin*, 7 Conn. 307.

A bill in equity by a surviving partner, to administer lands bought with partnership funds should be framed on the theory of a settlement of the accounts between the complainant and the intestate, and between them and the creditors, so that all the creditors may have an opportunity to present their claims, and a proper distribution of the proceeds of the sale of the land can be made. *Whitney v. Cotten*, 53 Miss. 689.

(u) In *Rice v. Gordon*, 11 Beav. 265, one of the cases of this class, the debt due to the plaintiff arose out of a transaction in which he had engaged as surety.

(x) *Cowell v. Sikes*, 2 Russ. 191; *Gray v. Chiswell*, 9 Ves. 118. In the former there was a petition, but this is now unnecessary.

file a bill (*y*); or, if the case was very simple perhaps proceed by summons in chambers.

Since the Judicature acts a creditor can, it is apprehended, sue both the surviving partners and the executors of the deceased partner, and obtain judgment against them all; the judgment against the executors being, however, of course limited to the assets of the deceased.

The right of creditors of the firm to obtain payment of their debts out of the assets of a deceased partner being thus established, their position, as regards the other creditors of the deceased, has next to be determined.

Right of creditors of firm compared with the rights of the separate creditors of the deceased.

From the doctrine that partnership debts are several as well as joint, it would logically follow that the creditors of a partnership should be entitled to rank against the assets of the deceased *pari passu* with his separate creditors. (*z*) But as will be seen hereafter, it is a rule in bankruptcy that the debts of a firm shall be paid out of the assets of the firm, and the separate debts of each partner out of his separate estate: and in administering the insolvent estate of a deceased partner the same rules have now to be adopted. (*a*) Accordingly the separate estate of a deceased partner must be applied in payment of all principal and interest due to his separate creditors before any part of such estate can be touched by the creditors of the firm (*b*);<sup>1</sup> and this rule applies even although the

(*y*) *Hills v. McRae*, 9 Ha. 297, is an instance of a claim; but claims are now abolished. See Cons. order 8, rule 4.

(*z*) See acc. *Burn v. Burn*, 3 Ves. 573, where a bond creditor of the firm obtained a payment as if he had been a separate specialty creditor of the deceased.

(*a*) Jud. Act, 1875, § 10. Even before they were adopted to some extent. See *Lodge v. Prichard*, 1 DeG. J. & Sm. 610.

(*b*) See *Lodge v. Prichard*, 1 DeG. J. & Sm. 610, and 4 Giff. 294; *Whittingstall v. Grover*, 10 W. R. 53; *Gray v. Chiswell*, 9 Ves. 118; *Addis v. Knight*, 2 Mer. 117; *Croft v. Pyke*, 3 P. W. 182.

<sup>1</sup> Partnership creditors have a primary claim upon partnership assets to the ex-

clusion of creditors of individual partners, until all the partnership debts are paid; and this rule excludes firm creditors from participation in assets of individual partners until their individual debts are paid. *Union Natl. Bank v. Bank of Commerce*, \*94 Ill. 271; *Black's Appeal*, 44 Pa. St. 503; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Hardy v. Mitchell*, 67 Ind. 485; *Filley v. Phelps*, 18 Conn. 294; *Conkling v. Washington University* 2 Md. Ch. 497; *Bond v. Nave*, 62 Ind. 505; *Conant v. Frary*, 49 Ind. 530; *Rainey v. Nance*, 54 Ill. 29; *Bass v. Estill*, 50 Miss. 300; *Crooker v. Crooker*, 46 Me. 250; *Sniffer v. Sass*, 14 Rich. 20, n.; *Houseal's Appeal*, 45 Pa. St. 484; *Morrison v. Kurtz*, 15 Ill. 193; *Moline &c. Manufg. Co. v. Webster*, 26 Ill. 233;

Pahlmian *v.* Cranes, id. 405; Thornton *v.* Bussey, 28 Ga. 302; Toombs *v.* Hill, id. 371; Bevan *v.* Allee, 3 Harr. 80; Chase *v.* Steel, 9 Cal. 64; Collins *v.* Butler, 14 Cal. 223; Burpee *v.* Bunn, 22 Cal. 194; Wintersmith *v.* Pointer, 2 Metc. (Ky.) 457; North River Bank *v.* Stewart, 4 Bradf. 254; Ganson *v.* Lathrop, 25 Barb. 455; Kirby *v.* Carpenter, 7 id. 373; Smith *v.* Mallory, 24 Ala. 628; Bridge *v.* McCullough, 27 Ala. 661; Van Wagner *v.* Chapman, 29 Ala. 172; Lucas *v.* Atwood, 2 Stew. 378; McCulloh *v.* Dashiell, 1 Har. & G. 96; Gleen *v.* Gill, 2 Md. 1; Foster *v.* Hall, 4 Humph. 346; Fleming *v.* Billings, 9 Rich. Eq. 149; Gadsden *v.* Carson, id. 252; Wilson *v.* McConnell, id. 500; Woddrop *v.* Ward, 3 Dessaus. 203; Christian *v.* Ellis, 1 Gratt. 396; Pierce *v.* Jackson, 6 Mass. 242; Fisk *v.* Herrick, 6 id. 271; Phillips *v.* Bridge, 11 id. 242; Goodwin *v.* Richardson, id. 469; Rice *v.* Austin, 17 id. 197; Adams *v.* Paige, 7 Pick. 542; Wilson *v.* Conine, 2 Johns. 280; Smith *v.* Baker, 10 Me. 458; Jarvis *v.* Brooks, 23 N. H. 136; Crockett *v.* Crain, 33 N. H. 542; Holton *v.* Holton, 40 N. H. 77; Treadwell *v.* Brown, 41 N. H. 12; Matleck *v.* James, 13 N. J. Eq. 126; Hill *v.* Beach, 12 id. 31; Wilder *v.* Keeler, 3 Paige, 167; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Muir *v.* Leitch, 7 Barb. 341; Oakey *v.* *v.* Rabb, 1 Freem. (Miss.) Ch. 546; Arnold *v.* Hamer, id. 509; Terry *v.* Butler, 43 Barb. 395; Murrill *v.* Neill, 8 How. 414; *Re* Warren, Dav. 320; Hubble *v.* Perrin, 3 Ohio, 287; White *v.* Union Ins. Co. 1 N. & McC. 556; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Willis *v.* Freeman, 35 Vt. 44; Converse *v.* McKee, 14 Tex. 20; Rider *v.* Gilbert, 16 Hun, 163; *ante*, 655, note.

See Irley *v.* Graham, 46 Miss. 425; Whipple *v.* Hill, 14 La. Ann. 437; Bank of Kentucky *v.* Keizer, 2 Duv. 169; Whitehead *v.* Chadwell, id. 432; Bell *v.* Newman, 5 Serg. & R. 78; White *v.*

Doughtery, 1 Mart. & Yerg. 309; Owens *v.* Davis, 15 La. Ann. 22; Grosvenor *v.* Austin, 6 Ohio, 103; Daniel *v.* Townsend, 21 Ga. 155; Scott *v.* Dunsley, 12 Ala. 714; Egery *v.* Howard, 64 Me. 68; Davis *v.* Grove, 2 Robt. 134, 635.

In cases of co-partnership, the equity in favor of separate creditors will not be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate. It is only when the legal recourse of joint creditors against the separate estate is terminated, and they have no claim against these assets except in equity, as in cases of bankruptcy, or death of a partner, that the joint creditors are postponed. Baker *v.* Wimpsee, 19 Ga. 87; Cleghorn *v.* Ins. Bank, 9 Ga. 319. See Haskill *v.* Johnson, 24 Ga. 625; Allen *v.* Wells, 22 Pick. 450; Kubne *v.* Law, 14 Rich. 18; Wisham *v.* Lippincott, 9 N. J. L. 353.

However, where land of one partner is set off on execution for a debt of the firm, and afterwards the same land is set off for a separate debt of the partner, the separate creditor will hold the land. It has been held that Jarvis *v.* Brooks, 23 N. H. 136; Crockett *v.* Crain, 33 id. 542; Holton *v.* Holton, 40 id. 77; Treadwell *v.* Brown, 41 Id. 12.

As a general rule, a partnership creditor cannot be compelled in equity by one of the partners, to whose separate estate he has resorted, to proceed against the joint estate instead. Wisham *v.* Lippincott, 9 N. J. Eq. 353.

The priority of lien of a judgment on a partnership debt, rendered after one partner had died, which lien attached to the real estate of the survivor, held in his individual right, will not be relieved against in equity, in favor of a subsequent judgment against the survivor for his individual debt, even though there be no assets to satisfy the latter judgment, and though the deceased

partner has left sufficient assets to satisfy the partnership judgment. *Meech v. Allen*, 17 N. Y. 300.

The doctrine that the separate debt of one partner should not be paid out of the partnership estate until all the debts of the firm are discharged, does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. *McDonald v. Beach*, 2 Blackf. 55; *Schaeffer v. Fithian*, 17 Ind. 463; *Dunham v. Hanna*, 18 Ind. 270. See *Dean v. Phillips*, 17 Ind. 406.

The right of partnership creditors to claim a preference over the creditors of the individual members of the firm, in the distribution of the partnership property, is wholly dependent upon the right of the individual partners to enforce a lien upon the partnership funds for the payment of the partnership liabilities, before individual debts; and if the contract of co-partnership be of such a nature, that the co-partners can enforce no such right, as between themselves, the partnership creditors can claim no such preference. *Rice v. Barnard*, 20 Vt. 479. See, also, *Schmidlapp v. Currie*, 55 Miss. 592; *Waterman v. Hunt*, 2 R. I. 293.

Ordinarily a partnership estate is liable to the payment of the debts of the firm in preference to the individual debts of the partners. This is the right of the partners *inter se*. The creditors of the partnership have no such right of priority over the creditors of the partners individually; but only by substitution to the rights of the partners *inter se*. The partners may release this right, and the creditors of the co-partnership cannot complain; for it is not their right, except subject to the disposition and control of the partners themselves, to whom it belongs. *Shackleford v. Shackleford*, 32 Grat. 481; *Schmidlapp*

*v. Currie*; *Waterman v. Hunt*, *supra*.

Where one partner, in good faith, assigned all his interest to the other, who in turn made a *bonâ fide* assignment for the payment of debts, giving some of his separate debts a preference: *Held*, that the partnership creditors could not sustain a bill for satisfaction of their debts out of the assigned property, until executions at law for those debts had been issued and returned unsatisfied. *Robb v. Stevens*, 1 Clark (N. Y.), 191.

Partners have the power, while the partnership assets remain under their control, to appropriate any portion of them to pay or secure their individual debts. A mortgage given by them to secure individual debts fairly due, is not rendered void by the mere fact that it operates to give individual debts a preference over demands against the firm; nor will such mortgage be set aside for that reason by a court of equity, unless, perhaps, when created in contemplation of insolvency to give an improper preference. *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13. See *ante*, 655, note.

The partnership, while it is solvent, may sell its property or give its note secured by mortgage, to one of the partners, and if the sale be made or the note and mortgage given in good faith and for valuable consideration, they will be valid against the claims of the partnership creditors, and although, if such note and mortgage be retained by the partner until the bankruptcy of the firm, he will not be allowed to enforce them against the company assets to the exclusion of the partnership creditors, because he is himself liable to these creditors, yet the assignee of such note and mortgage, who has received them in good faith and for valuable consideration during the solvency of the firm, holds them unaffected by the claims of the partnership creditors. *Waterman v. Hunt*, 2 R. I. 293. See *ante*, 655, note.

Where the trustee under a deed of trust made by the surviving partners after the dissolution of an insolvent firm by the death of a member, had appropriated money of the firm realized by him before the service of an attachment in a suit in which the deed was declared unauthorized, to the payment of his own and other preferred debts, in violation of the right of partnership creditors to be paid before creditors of individual partners, and to share ratably: *Held*, that the payments could not be allowed to stand. *Barcroft v. Snodgrass*, 1 Coldw. 430.

At a time when a debtor was allowed to give preferences, one who was a member of an insolvent partnership conveyed his separate real property in satisfaction of his debt to a separate creditor. Its value exceeded the debt: *Held*, that the firm creditors had an interest in the excess, and that, in equity, the property conveyed would be held as a security, first for the debt due to the grantee, and, as to the excess of value, for other debts. But the real estate conveyed being the separate property of the co-partner, the excess of value was bound first, for his separate debts, and only after satisfying these was it applicable to the debts of the partnership. *Bailey v. Kennedy*, 2 Del. Ch. 12.

An assignment by co-partners of their individual property, as well as their partnership property, to pay the joint debts of the firm, is not on that account void. *Van Rossum v. Walker*, 11 Barb. 237.

The members of an insolvent partnership assigned their partnership property together with certain real estate, which they owned as tenants in common, in trust for the payment of their partnership debts, with a reservation to themselves of the surplus, if there should be any: *Held*, that the assignment was void as to individual creditors of the assignors, on account of this reser-

vation. *Collomb v. Caldwell*, 16 N. Y. 484. See *ante*, ASSIGNMENTS.

Equity will not sustain an agreement made by partners for the purpose of giving the separate creditors of one partner a preference to the creditors of the firm, if the firm be, 'at the time of making such agreement, insolvent. *Collins v. Hood*, 4 McLean, 186.

One partner has no right to assign to his separate creditors any portion of the effects of the partnership, to the prejudice of the partnership creditors. *Black v. Bush*, 7 B. Mon. 210. See *ante*, ASSIGNMENT.

A creditor of one of several partners has no right, even under an express contract with such partner, to apply partnership effects to the satisfaction of a debt against such partner, unless the other partner consents to the contract. *Broadbush v. Evans*, 63 N. C. 633.

A partner sold his interest in the firm to his co-partner, who agreed to pay the firm debts. The firm was at the time insolvent. After the sale, continuing partner gave a deed of trust on all the assets of the late firm, to secure the payment of an individual indebtedness of his own, which accrued prior to the dissolution. In a contest between a creditor of the firm and the individual creditor,—*held*, that the right of the former to be paid out of the firm assets in preference to the latter was not impaired by the dissolution, and as against him the deed of trust was a nullity. *Phelps v. McNeely*, 66 Mo. 554.

In *Jones v. Lusk*, 2 Metc. (Ky.) 356, it was held that the only insolvency which will give the chancellor jurisdiction to decree priority of payment in favor of partnership debts, is that which is ascertained and established by a judgment, execution, and return of "no property" against one or more of the partners. In *Levy v. Ley*, 6 Abb. Pr. 89; S. C. 15 How, Pr. 395, it was held that proof that the defendants have sus-

pending payment on their liabilities, and pay nothing in full except such small claims as would be pressed to judgment if not settled, and which are paid to prevent the assets from being sacrificed,—is sufficient proof of insolvency to authorize an injunction and appointment of a receiver, in an action by a creditor of a partnership on an indebtedness of the firm.

Where a partnership is insolvent, or where its solvency is doubtful, a court of equity will restrain a sale and the taking of possession of the partnership property under an execution against an individual member of the firm until the settlement of the partnership affairs, in order to ascertain whether the debtor-partner has a real and valuable interest over and above the liabilities of the firm. *Hubbard v. Curtis*, 8 Iowa, 1.

Property attached in a suit against a partnership, *prima facie*, in the absence of contrary showing, will be presumed to be partnership property; and before individual property can be afterward taken, it behooves plaintiff to show that this first has been exhausted, or that, for some good reason, it was exempt. *Lewis v. Conrad*, 11 Iowa, 153.

Where a firm has become insolvent and an application has been made for receivers, a special partner in the insolvent firm is entitled to come in and claim as a creditor of the partnership, and to receive a dividend out of the assets *pro rata* with the other creditors. *White v. Hackett*, 24 Barb. 290.

A partner mortgaged his private property for a firm debt, and on that mortgage the property was sold and the debt satisfied, after the firm assets had gone into the hands of an assignee for creditors: *Held*, that the separate estate of the partner stood on the same footing as other general creditors of the firm. *Kendall v. Rider*, 35 Barb. 100.

Where a surviving partner has paid the partnership debts of a losing con-

cern, he is entitled to be substituted for the amount that the estate of the deceased partner is indebted to him on that account, to the rights of the creditors of the firm whose debts he has paid. *Morris v. Morris*, 4 Gratt. 293.

Where a person becomes a member of a firm, purchasing an interest in a mill and the ground upon which it stands, and there is a prior encumbrance by mortgage upon the premises, which the former owners agreed to remove, and also a mechanic's lien, of which the purchasing partner had no notice, the real estate becomes partnership property, and upon an adjustment of the rights of the partners and partnership creditors, and creditors of individual partners, the purchasing partner, as against the separate creditors of the partners, will be considered a creditor of the firm, and as such, entitled to be reimbursed out of the joint fund, to the exclusion of such separate creditors, to the extent of those prior liens which had been satisfied on a sale of the firm property. *Rainey v. Hance*, 54 Ill. 29.

Where, in a suit against two partners, for a partnership debt, one of them is discharged upon his plea of infancy, and judgment is taken against the adult partner, the judgment is still a partnership debt, to which the partnership funds must be applied in preference to debts of the individual partners. *Gay v. Johnson*, 32 N. H. 167.

Sureties on a bond given to dissolve an attachment in a suit against partners, can recover from the firm the amount paid by them on such bond, although the judgment was recovered against one partner only, the suit having been discontinued against the others for want of jurisdiction. *Inbusch v. Farwell*, 1 Black, 566.

In the United States courts, partnership property may be held for partnership debt, though judgment can be obtained only against one partner, by

reason of the other's being out of the jurisdiction. *Inbusch v. Farwell*, 1 Black, 566.

Where the same partners carry on the same business at different places, under different partnership names, there are not two distinct firms, and the assets of both nominal firms are equally applicable to the payment of all the creditors of both. *In re Williams*, 3 Wood, 493.

B and C were partners under the firm name of B & C, and also co-partners with A, under the firm name of A, B & C. The demandant, a partnership creditor of the firm of A, B & C, having attached and levied on the real estate of B & C, purchased by them with partnership funds and for their partnership use, but held by them as tenants in common, the same was subsequently attached and levied on by the tenant, who was a creditor of the firm of B & C, as their partnership property, and the demandant brought his writ of entry to recover the same: *Held*, that the demandant by his previous attachment and levy acquired the better title at law to the premises, and was entitled to judgment, but judgment was withheld to await the result of a suit in equity then pending to subject the land to the partnership debts of B & C. *Peck v. Fisher*, 7 Cush. 387.

The legal priority obtained against a firm composed of two partners, by a partnership creditor of a firm consisting of the same individuals, joined with a third, will be postponed in equity to the claims of the partnership creditors of the former. *Shedd v. Wilson*, 27 Vt. 478.

Where a person is a member of two partnerships, his separate creditors have a preference over his interest in the property of one of the firms as against creditors of the other firm. *Weaver v. Weaver*, 46 N. H. 188.

Where a partnership is changed by the admission of a new partner, the

creditors of both the old and new firms will in equity be allowed to share alike in the partnership property. *Shedd v. Bank of Brattleboro'*, 32 Vt. 709.

A and B, partners, gave a joint and several bond and warrant of attorney to T. for a partnership debt. Judgment was entered and execution issued Feb. 7, 1876. Feb. 20, A and B made an insolvent assignment, B being also individually insolvent. The judgment being only partly satisfied, and A having made an assignment, it was held that T might, under A's assignment, share equally the personal effects of A, and was not to be subordinated to his individual creditors. *Howell v. Teel*, 29 N. J. Eq. 490.

On the 1st day of June, 1842, A, B and C entered into partnership in the business of keeping a livery stable, and, as such partners, purchased of D, property necessary for conducting such business, to the amount of \$8,200, for which they gave their joint and several promissory notes, payable on the 1st day of February, in the years 1843, 1844, 1845 and 1846, respectively. In August, 1842, C died; and the business of the partnership was continued by A and B, with the partnership capital, without any adjustment of the partnership concerns until May, 1844; during which time they paid from the partnership funds two of the notes to D, amounting to \$4,200, the other two being still unpaid. At the time of C's death, the partnership property was sufficient to pay the partnership debts, but the business was afterwards ruinous. A being appointed administrator of C, sold in May, 1844, by order of the court of probate, and with the consent of C's heirs, one undivided third part of the partnership property then remaining to E, for the use and benefit of A; and A thereupon assumed the payment of that portion of the notes to D, which it belonged to C in his life-time to pay. On the 19th of June following, A settled

his administration account, charging C's estate with \$3,002, on account of the notes given to D, and crediting the estate with \$2,094, for the avails of the partnership property belonging to it, thus showing a loss resulting to it from the partnership concern of \$908. After the death of C, new partnership debts were contracted, which are still unsatisfied. Some of these creditors brought suits on their respective claims against A alone, attaching his interest in the partnership property, which suits are still pending. In April, 1844, A executed a mortgage of all his interest in the partnership property to certain other creditors, to secure debts against him individually. A is entirely insolvent, and B has no estate, except his interest in the partnership property. On a bill in chancery brought by the heirs of C against A and B and the attaching creditors and mortgagees of A, it was *held*,

1. That the notes given by A, B and C to D, notwithstanding their form, constituted a partnership debt.

2. That although the notes given to D were, in form, several as well as joint, so that D could sustain an action at law thereon against C's administrator, without resorting to A and B as surviving partners, yet this did not vary the equitable rights of those interested in C's estate, nor prevent the interposition of a court of chancery, to apply the partnership effects in payment of the debt;

3. That the rights of those interested in C's estate were not impaired by delay in closing the partnership concerns;

4. That they were not impaired in consequence of the sale to A through the agency of E; for whether A could, under the circumstances, be both seller and purchaser or not, yet he received the property subject to the incumbrance of the notes to D, and it was still liable for the payment of those notes;

5. That the creditors of the partner-

ship whose debts were contracted after the death of C, were entitled to share in the partnership effects;

6. That those creditors who had brought suits against A alone and attached his interest in the partnership property, which suits were still pending, were also entitled to share in the partnership effects;

7. That the mortgagees and other creditors of A individually could take nothing, except his share in the partnership property remaining after payment of the partnership debts. *Filley v. Phelps*, 18 Conn. 294.

A person who has advanced money to one of several partners, upon his indorsement of a note made by another partner, cannot come into a court of chancery for payment of the note out of the partnership effects, though the proceeds of the note were applied to partnership purposes. *Coster v. Clarke*, 3 Edw. Ch. 411.

The excess of one partner's advance over those of another, constitutes a preferred claim upon the partnership property or its proceeds, against the individual creditors of the bankrupt partner. *Conkling v. Washington University*, 2 Md. Ch. 497. See, also, *Buchan v. Sumner*, 2 Barb. Ch. 165.

A judgment confessed by one partner in favor of his co-partner, to secure him for capital advanced to the concern, is valid against the judgment of a private creditor of the partner who confessed the judgment. *Purdy v. Lacock*, 6 Pa. St. 490.

A and B were partners. A owed the firm \$17,600. He died. The surviving partner assigned the firm assets to an assignee for the benefit of creditors. The assignee claimed of A's administrator that out of A's individual assets he should pay to the assignee the \$17,600 which A owed the firm. The individual creditors of A resisted this claim, on the ground that it was substantially

a claim by the firm creditors to come in upon A's separate estate, notwithstanding the existence of a fund of their own; an objection which the trial court thought valid, and disallowed the claim. The appellate court reversed the decision and allowed the claim, holding that "the debt of a partner to his firm for partnership effects withdrawn and appropriated to his separate use," was not "a partnership debt," but an individual debt, and that he was "just as much a debtor severally for what the firm has advanced to him as he would be to another creditor," and this, notwithstanding "when his debt is paid, it will go into the firm and form a part of its assets, and the firm creditors will then come in upon it as part of their fund." A partnership debt is a debt which a partnership owes to its creditors, not that which another owes to it, whether its debtor is one of the partners themselves or some one else. *McCormick's Appeal*, 55 Pa. St. 252. See, also, *Busby v. Chenault*, 13 B. Mon. 554; *Payne v. Matthews*, 6 Paige, 19.

A, B and C were partners. B sold the partnership property, took notes, and received some money thereon from the purchasers. He gave A and C his own notes for their shares, with the understanding that a settlement should take place when all the other notes were collected, each partner bearing his proportion of the loss from bad debts, if any. On a bill by A against B's executor, *held*, that A was entitled to his share of the money received or to be collected on the notes given for the partnership property by the purchasers, in preference to the private creditors of B. *Ridgely v. Carey*, 4 Har. & M. 167. See, also, *Christian v. Ellis*, 1 Gratt. 396.

A held a contract, upon which certain money was to be received for the benefit of B and C, who were partners. B and C ordered the money, when received, to be paid over to D, to whom the partner-

ship was indebted; and B, surviving partner, after the death of C, made a formal assignment of the money to D, to be appropriated to the payment of his demand against the partnership. After this, A received the money, at different times, and paid it over to D. Meanwhile, E summoned A and D, as trustees of B and C: *Held*, that D was entitled to so much of the money as would satisfy his demands against the partnership, but that he was not entitled to retain for the private debt of B, the surviving partner, nor for the debts of other creditors of B and C, to whom, without any authority, he had said that, if there was any balance in his hands, he would pay the debts. *French v. Lovejoy*, 12 N. H. 458.

Where an individual member of a firm deposits with a creditor of the firm a promissory note belonging to such partner, as collateral security for a particular debt owing by the firm to such creditor and afterwards pays the debt, the party so depositing the collateral can recover the proceeds collected by the creditor, notwithstanding there may remain other unadjusted claims due from the firm to such creditor, the firm being solvent at the time, on the ground of the separate property of one partner not being liable to be taken in the first instance, to satisfy partnership debts. *Adams v. Sturges*, 55 Ill. 468.

A firm to secure creditors agreed to transfer certain coal barges, mules, etc., to them and execute a bill of sale, the creditors agreeing at the same time to take the real estate of one of the firm and pay the liens thereon, which were for his individual debts; deeds for the property were made, but the creditors did not pay the liens, and in an action in the name of the individual partner against the creditors on their agreement to take his property and pay the liens, the defendants claimed that it and the bill of sale were one transaction, and

that they were entitled to default against the amount to be recovered against them, damages for breach of the partnership contract in not turning over to them the property sold, to which they covenanted that they had a good title: *Held*, defense not valid, its effect being to divert to the creditors of the partnership a fund arising from private property specifically appropriated to private debts. *Jackson v. Clymer*, 43 Pa. St. 79.

The ratification by the firm of the unauthorized act of one partner in signing the firm name to a contract of suretyship is ineffectual as against existing partnership creditors, being in substance an adoption by the firm of the private debt of one partner. *Kidder v. Page*, 48 N. H. 330.

Where one partner retires from a firm and releases all his interest in the assets to the other partner, who agrees to pay all the company debts, the right of priority still continues in the partnership creditors in respect to such assets. *Caldwell v. Scott*, 54 N. H. 414. Succession of Beer, 12 La. Ann. 698; *Wilson v. Soper*, 13 B. Mon. 411.

Upon the dissolution of a partnership between A and B, A assumed the payment of the partnership debts: *Held*, that a partnership creditor could not proceed for the appointment of a receiver of B's property only, without showing some sufficient reason for not proceeding against the property of the partnership, and of A. *Henry v. Henry*, 10 Paige, 314.

The property of the partnership remains subject to the preference of the partnership creditors, notwithstanding the survivor may have managed and treated it as his own, with the assent of the administrator of the deceased partner, and may have contracted debts upon the credit of the property. *Benson v. Ela*, 35 N. H. 402. See, however, *Topliff v. Vail*, Harr. Ch. 340.

Where land was purchased by a partnership, but not used by them in their business, and it afterwards was sold under execution against one of the partners, and it did not appear that the purchaser had notice that it was partnership property: *Held*, that the land so purchased was not to be made liable in his hands for partnership debts. *Buck v. Winn*, 11 B. Mon. 320.

If two persons who are not in fact partners, hold themselves out to certain creditors as partners of a stock in trade, so as to become liable to them as such, although the stock belongs exclusively to one, the rights of these creditors would rest upon estoppel, which would be personal to the parties bound, or their privies, not upon a lien on or equity in the stock, to be worked out through the parties; and therefore, in a controversy between such creditors and a purchaser of the stock at execution sale under a judgment against the actual owner of the goods as the sole proprietor, the purchaser would have the better right. *Hillman v. Moore*, 3 Tenn. Ch. 454. See, also, *Allen v. Dunn*, 15 Me. 292.

A, with the consent of B, did business in his name and bought goods of C and also of D, who both gave credit to B. C brought an action against B and attached goods as his property. Subsequently D brought an action against A, doing business under the name of B, and attached the same goods. C was then allowed, without notice to D, to amend his writ by adding the name of A as a defendant and declaring against A and B as co-partners doing business under the name of B. Both C and D recovered judgments. As between A and B the latter had no interest in the attached goods: *Held*, that the goods attached were first to be applied in satisfaction of the execution obtained by C on his judgment; and that the amendment was immaterial. *Wright v. Herrick*, 125 Mass. 154.

The creditors of a partnership consist-

ing of A and B, who were mostly ignorant of the partnership and dealt with A alone, after the partnership goods had been attached by C to secure a debt in his favor against A individually, with a view to save expenses, consolidated their debts and took a note to D for the amount, it being agreed, between them and B, that he should not be called upon beyond the value of the partnership goods. D, in a suit on such note, afterwards attached the same goods. A and the partnership were insolvent and had no other property than the goods attached, which were of less value than the amount of the note to D. On a bill in chancery, brought by D against C, claiming priority of lien, it was *held*, 1, that the agreement between the partnership creditors and B was a fair and proper one as between them, and that neither C nor A could complain of it; 2, that D was entitled to the priority claimed; 3, that the only adequate remedy was in chancery, where all the parties interested might be brought together and their several rights determined. *Witter v. Richards*, 10 Conn. 37.

Where a debtor partner, by his will, has subjected his real estate to the payment of his debts, his partnership creditors are entitled to share with the separate creditors in that fund. *Morris v. Morris*, 4 Gratt. 293.

Partnership property is first to be applied to the payment of partnership debts, but a partnership creditor may, with the assent of the firm, waive this privilege and agree to share *pro rata* with the creditor of the individual partner. *Linford v. Linford*, 29 N. J. L. 113.

The rule that the creditors of a partnership will not be permitted to reach the individual estate of a deceased partner until all the separate creditors are satisfied, applies only to cases founded on the relation of debtor and creditor, and cannot interfere with the remedy

against an individual as a wrong-doer, or his estate. *Morgan v. Skidmore*, 55 Barb. 263.

The rule that partnership property must be first applied to the payment of partnership debts, does not apply in the case of a silent partner: in such case, the partnership property may be taken for the private debts of the ostensible partner, although there be partnership debts unpaid. *Cammack v. Johnson*, 2 N. J. Eq. 163. See, also, *French v. Chase*, 6 Me. 166.

In the case of a dormant partnership, an attachment of the stock in trade in the hands of the ostensible partner, in a suit against him alone, has preference to a subsequent attachment of the same goods by another person in an action against the partners. *Lord v. Baldwin*, 6 Pick. 348.

Where a surviving dormant partner was a creditor of the firm for advances and profits, and where the deceased partner had promised to pay the same: *Held*, that he might have a remedy by filing his claim with the commissioners of insolvency upon the estate of the deceased, and that they might allow it, postponing payment, until the creditors had been paid in full. *Johnson v. Ames*, 11 Pick. 173.

The doctrine, that a separate debt of one partner shall not be paid out of the partnership property till all the partnership debts are paid, is, it is said, applicable only where the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. *Mittnacht v. Smith*, 17 N. J. Eq. 259. See, also, *Gillaspy v. Peck*, 46 Iowa, 461.

The *quasi lien* of the creditors of a partnership, on its property, as against creditors of individual members of the partnership, gives equity jurisdiction for the purpose of protecting the members of the partnership. *Blackwell v. Rankin*, 7 N. J. Eq. 152.

The preference which the law gives the creditors of a partnership to be first satisfied out of the firm property, will, however, be protected in proceedings of garnishment by firms and individual creditors. *Switzer v. Smith*, 35 Iowa, 269.

Where one partner, without the knowledge or consent of his co-partner, pays his own note to a private creditor out of the funds of the insolvent firm, such creditor knowing that the money belonged to the firm, the funds so received will be regarded as held by the private creditor in trust for the benefit of the firm, and may be attached in his hands upon a trustee process instituted against the firm by one of its creditors. *Johnson v. Hersey*, 70 Me. 74; S. C. 8 Am. Law Record, 720.

The rule applies where a court of equity is asked to set aside a fraudulent conveyance of real estate. *Hardy v. Mitchell*, 67 Ind. 485. See *Loving v. Paired*, 10 Iowa, 282.

The fact that an individual creditor foregoes his right to have a fraudulent conveyance of the real estate of such partner set aside, gives a partnership creditor no right to attack such conveyance. *Hardy v. Mitchell*, 67 Ind. 485. The only interest of the partnership creditor in such case is in the residue of the individual property over individual debts. *Hardy v. Mitchell*, *supra*.

In a complaint by a partnership creditor, attacking an alleged fraudulent conveyance of the individual real estate of the partner, it would be proper to aver that there were no individual debts. *Hardy v. Mitchell*, *supra*.

An action attacking such conveyance might be brought jointly by partnership and individual creditors. *Hardy v. Mitchell*, *supra*.

The administrator of a surviving partner represents the partnership assets, as well as the individual estate of his in-

testate. Accordingly, it is held that a partnership creditor being in time to recover against the estate of the surviving partner, in which event that estate would be entitled to proper reimbursement from the partnership fund, it is therefore proper to reach the same result without circuitry, by allowing the creditor to resort to the partnership fund directly. *Brooks v. Brooks*, 12 Heisk. 12.

Where the partnership property is not sufficient to pay the debts of the firm, the priority of the United States does not reach the undivided interest of one of the partners in the partnership effects, if he is indebted to the United States, but when it has become his separate, individual property, the rule is different. The true test is, whether the property belongs to the partnership or to the individual. *United States v. Duncan*, 12 Ill. 523.

The creditors of a partnership applied to a State court by bill, to declare the partnership, and decree the payment of the partnership debts out of assets in the hands of the administrators of one of the partners who had died insolvent, indebted to the United States. The administrator denied the partnership, and took an objection based on the debts being due the United States and its priority. The United States were not parties, and did not appear in the State court. The State court decreed in accordance with the prayer of the bill: *Held*, that the proceedings in the State court did not impair the rights of the United States, and that it was not bound by them; but that, notwithstanding the decree in the State court, the priority of the government attached, and that whenever the proceeds of any real estate or personal estate came into the hands of the administrator, he became a trustee for the United States, which must first be paid. *United States v. Duncan*, 12 Ill. 523.

surviving partners may be bankrupt. (c) If, indeed, there is not, \*and never was, since the death of the deceased any joint estate whatever, and no solvent partner, it seems that the joint creditors may rank *pari passu* with the separate creditors of the deceased, against his separate estate. (d)<sup>1</sup>

Again, the rule which in bankruptcy precludes one partner from proving against the separate estate of his co-partner, whilst the joint debts are unpaid, also applies in administering the estate of a deceased partner. (e)

The separate estate thus primarily liable to the separate creditors of the deceased, does not include his share in the partnership assets; for he has no share in those assets, except subject to the payment of the debts of the firm. Whilst, therefore, the separate creditors of the deceased are entitled to be first paid out of his separate estate, the creditors of the firm are entitled to be first paid out of its assets, and, consequently, to be paid in full before the share of the deceased in those assets becomes available for the payment of his separate creditors. (f)<sup>2</sup>

Share in firm  
not available  
for separate  
creditors till  
joint creditors  
are paid.

(c) *Lodge v. Prichard*, and *Whittingstall v. Grover*, *ubi sup.* See, as to winding up the estate of a deceased partner in bankruptcy, where the surviving partners are bankrupt. *Ex parte Gordon*, 8 Ch. 555; *Morley v. White*, ib. 214.

(d) See *Cowell v. Sikes*, 2 Russ. 191; and *Lodge v. Prichard*, *ubi sup.*

<sup>1</sup> If there is no joint fund nor any solvent partner, joint creditors may participate equally with a private creditor in the estate of a deceased partner. *Pahlman v. Graves* 26 Ill. 405; *Brock v. Bateman*, 25 Ohio St. 609; *Rogers v. Meranda*, 7 id. 179.

(e) *Lacey v. Hill*, 8 Ch. 441. Compare *Ex parte Topping*, 4 DeG. J. & Sm. 551.

(f) See *Ridgway v. Clare*, 19 Beav. 111; *Hills v. McRae*, 9 Ha. 297.

<sup>2</sup> All the debts due from the joint fund must first be discharged, before any partner can appropriate any part of it to his own use, or pay any of his private

debts; and a creditor of one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made with his debtor or on a seizure of the goods on execution or attachment. *Pierce v. Jackson*, 6 Mass. 242; *Fish v. Herrick*, id. 271; *Phillips v. Bridge*, 11 id. 212; *Goolwin v. Richardson*, id. 469; *Rice v. Austin*, 17 id. 197; *Adams v. Paige*, 7 Pick. 542; *Wilson v. Conine*, 2 John. 230; *Smith v. Baker*, 10 Me. 458; *Menagh v. Whitwell*, 52 N. Y. 147; *Cox v. Russell*, 44 Iowa. 556; *Williams v. Gage* 49 Miss. 777; *Faler v. Jordan*, 44 id. 233; *Irby v. Graham*, 46 id. 425. See *Fenton v. Folger*, 21 Wend. 676; *Stevens v. Bank of Central N. Y.* 31 Barb. 290; *Reed v. Shephardson*, 2 Vt. 120; *Gillaspay v. Peck*, 46 Iowa, 461.

The mere insolvency of a co-partnership is sufficient to defeat an attachment made by a creditor of one of the firm, although the partnership creditors have commenced no action for the recovery

Actions by creditors of the firm to obtain payment out of the assets of a deceased partner, are well illustrated by *Brett v. Beckwith*. (g) In that case there had been two partners, Young and Beckwith. Beckwith was dead, and Young was bankrupt. A bill was filed by a creditor of the

Action by joint  
creditors.  
*Brett v. Beck-  
with.*

of their debts. Therefore, where an officer had attached the partnership effects in a suit against one of the partners, and afterwards with the consent of the firm, which was insolvent, suffered the effects to be applied to pay a partnership debt due to a stranger, it was held that he was not responsible to the first attaching creditor in an action for not having seized the goods in execution. *Bank v. Wilkins*, 9 Me. 28.

The joint sale of partnership property, on separate executions against the individual partners, leaves their interest as they were. Where one was more in advance of the other than the whole proceeds, partnership executions are to be first satisfied, and then the separate execution creditors of such partner, in exclusion of the other partner and his separate execution creditors. *Cooper's Appeal*, 26 Pa. St. 262. See, also, *Vandike's Appeal*, 57 Penn. St. 9.

An individual creditor attached firm property; a firm creditor thereupon attached the same property: *Held*, that, in order to obtain the precedence to which the firm creditor had a right, and to oust the first attachment, it must appear by a bill in equity, or in some way, that all the firm property was needed to pay the firm debts. *Scudder v. Delashmut*, 7 Iowa, 39.

The court will not, by injunction, restrain the sale of the interest of one partner in co-partnership property under a judgment and execution against such partner for a debt due from him individually, where there are no averments in the complaint to show that the debtor in the execution has not some interest

in the property levied on, after the satisfaction of the partnership debts, and after deducting the interest of the solvent partners from the partnership estate. *Mowbray v. Lawrence*, 13 Abb. Pr. 317; 22 How. Pr. 107. See, also, *Moody v. Payne*, 2 John. Ch. 548.

One partner, who has sold out his interest to his co-partner, retaining by agreement a lien upon the property for his indemnity, may obtain an injunction to prevent a private creditor of the vendee-partner from selling on execution before an account had been taken, and the interest of the vendee-partner in the property thereby ascertained. *White v. Parish*, 20 Tex. 688; *Rogers v. Nichols*, Id. 719.

Certain creditors obtained judgments against an insolvent limited partnership, upon failure to answer, and levied execution on the partnership effects; after which the partners made a general assignment for benefit of creditors, without preferences: *Held*, that, at suit of a creditor at large, those proceedings would be enjoined and a receiver appointed to take charge of all the assets of the firm, as they existed at the time of its insolvency, discharged of the liens of the executions, and to distribute the same equally among all the creditors. *Jackson v. Sheldon*, 9 Abb. Pr. 127.

Where there is a *fi. fa.* against a firm, and an older *fi. fa.* against one of the partners, the proceeds of a sale of partnership property must be applied first to the *fi. fa.* against the firm. *Crawford v. Baum*, 12 Rich. 75. *Coover's Appeal*, 29 Pa. St. 1. See, *Miller v. Miller*, 3

late firm against the executors of Beckwith and the assignees of Young, praying for a declaration that Beckwith's real and personal estate was liable in equity, after satisfying his separate debts, to the

Pittsb. 540; Cope's Appeal, 39 Pa. St. 284.

An action for a false return will not lie against a sheriff for returning an execution *nulla bona*, where the property of a firm is levied on under an execution against one of its members, and previous to a sale, an execution against the firm comes to the hands of the sheriff, under which the property levied on by the first execution is exhausted. *Dunham v. Murdock*, 2 Wend. 553; *Tappan v. Blaisdell*, 5 N. H. 189.

Where more is levied on partnership property than is sufficient to pay partnership executions, the balance may be applied to pay private executions in the hands of the officer. *Roop v. Rogers*, 3 Watts, 193.

B. & L., as a firm, were members of two other partnerships, and all three firms failed. The creditors of the two other firms put attachments on property belonging to B. & L. before the creditors of that firm attached it: *Held*, that the creditors of B. & L. were entitled to the proceeds of a sheriff's sale of the property. *Bullock v. Hubbard*, 23 Cal. 495.

Where the sheriff has in his hands at the time of the sale an execution against one partner, and also executions against the firm, and sells the goods absolutely and not in the interest of one partner therein, the presumption is that he sold under the executions against the firm. *Rider v. Gilbert*, 16 Hun, 163.

A judgment recovered against all the partners of a firm, upon process served upon all, imports in itself the existence of a partnership debt. *Jaques v. Greenwood*, 12 Abb. Pr. 232.

Where there is a judgment against a firm, and the creditor has a priority under an execution on the property of such a firm, he retains it, though he does not

show that his claim was on a partnership transaction, the presumption being that it was. *McDuffie v. Bartlett*, 3 Pa. St. 317.

In order however, to entitle a judgment creditor, on a bond, given in the partnership name to be satisfied out of the proceeds of a sale of partnership property, in preference to a prior execution against one partner, levied on the same property, it is: *held*, that it must appear affirmatively that the bond was given to secure the payment of a partnership debt. *Snodgrass' Appeal*, 13 Pa. St. 471.

Firm property is not holden by an attachment in a suit based on the joint and several notes of the partners, and not being a partnership debt. *Buffum v. Seaver*, 16 N. H. 160.

A and B partners, executed a bond as follows, to wit: "We, A and B now trading under the firm of A & Co., are held and bound, &c.; for payment whereof we bind ourselves, and each and every of our heirs, executors, and administrators, jointly and severally": *Held*, that, whether the bond was binding on the partnership or not, it was the separate debt of each of the partners, and that the obligee was not bound to resort to the partnership in the first instance. *Perman v. Tunno*, Riley, Eq. 181.

In this action, commenced by one partner against his co-partner to adjust the affairs of the partnership, which was insolvent, and to distribute its assets equally among its creditors, a receiver was by stipulation appointed. After the commencement of this action and the appointment of a receiver, and during the pendency of this action, other actions were brought against the firm by certain of their creditors and judg-

joint debts of the firm; for an account of such debts at Beckwith's death; for an account of the joint assets received by his executors and Young's assignees; for an account of Beckwith's separate debts; that his real and personal estate might be applied, first in payment of his separate debts, and then in payment of the joint debts; and that a receiver might be appointed to get in the outstanding joint assets. The Court held that the plaintiff was clearly entitled, as a creditor of Beckwith, to have his \*estate fully ad- \*1056 ministered; and for that purpose to have an account taken of his separate estate; and to have the accounts between Beckwith's executors and Young's assignees also taken, in order to ascertain of what the joint estate consisted; and a decree was accordingly made for taking such accounts.

When a creditor of the firm proceeds against the assets of a deceased partner, the form of the judgment which is given is in substance as follows (*h*):

Judgment in action by creditors of firm against the executor of a deceased partner.

1. It is declared that all persons who are creditors of the deceased, are entitled to the benefit of the judgment.

ments were recovered therein, upon which supplementary proceedings were instituted, resulting in the same person being appointed receiver therein as in the first mentioned action. Subsequently the plaintiffs in the creditor's actions applied to have the receiver directed to pay their debts out of the assets in his hands: *Held*, that the judgments recovered by the plaintiffs gave them no priority over the other firm creditors, and that the order was properly denied. *Holmes v. McDowell*, 15 Hun, 586.

When there has been no transfer by the firm, and the property remains in specie and capable of being levied upon, it may be followed in the hands of those claiming by virtue of such transfers or proceedings, and may be levied upon by a judgment creditor of the firm. *Menagh v. Whitwell*, 52 N. Y. 147.

Accordingly, where two members of a firm of three mortgaged their interests to secure individual debts, and the third transferred his interest to a stranger, a levy under execution for a partnership

debt upon the firm property, in the hands of a purchaser under the mortgage is valid. *Menagh v. Whitwell*, 52 N. Y. 147.

Certain real estate being owned by a firm composed of two partners and used in the business of the partnership, one of them alone executed a mortgage on an undivided half of it, to secure the payment of his individual debt. Afterwards said real estate was sold at sheriff's sale under a judgment rendered after the execution of said mortgage against the partners, for a debt of the firm contracted before the execution of the mortgage: *Held*, that the mortgagee was not entitled to foreclose his mortgage as against the purchaser at the sheriff's sale, without first redeeming or offering to redeem from the sheriff's sale that part of the real estate covered by said mortgage. *Kestner v. Sindlinger*, 33 Ind. 114.

(*h*) See *Hills v. McRae*, 9 Ha. 297; *Harris v. Farwell*, 13 Beav. 407; *Rice v. Gordon*, 11 Beav. 271.

2. It is declared that the surplus of the estate of the deceased, after satisfying his funeral and testamentary expenses and separate debts, was liable at the time of his death to the joint debts of the firm, but without prejudice to the liability of the surviving partner, as between himself and the estate of the deceased.

3. An account is directed to be taken of the funeral and testamentary expenses and separate debts of the deceased, and of the debts of the firm. If the surviving partner is not a party to the action, liberty is given him to attend in the prosecution of this last inquiry.

4. An account is directed to be taken of the personal estate of the deceased.

5. It is ordered that his personal estate be applied, in the first instance in the payment of his separate debts and funeral expenses, in a due course of administration, and then in payment of the debts of the firm.

6. And if the personal estate of the deceased is insufficient for the purposes of the action, inquiries are ordered to be made for the purpose of ascertaining the real estate to which the deceased was entitled.

The judgment will, if necessary, direct inquiries whether the creditors of the firm continued to deal with the surviving partners, and what sums have been paid by them to such creditors, and whether the creditors have, by their dealings with the surviving partners, released the estate of the deceased from the payment of their respective debts. (*i*)

\*1057 \*No directions are usually given for the purpose of keeping distinct the joint and the separate estates; but, if necessary, it is conceived that such directions would be given in order that the principles upon which the judgment is framed might be properly carried out. (*k*)

In *Ridgway v. Clare* (*l*) two partners, A. and B., had died. A suit was instituted by a separate creditor of A. for the administration of his estate; a suit was also instituted by a separate creditor of B. for the administration of his estate; a third suit was instituted by a joint creditor of A. and B. for pay-

*Ridgway v. Clare.*

(*i*) See the decree in *Devaynes v. Noble*, 1 Mer. 530, and in *Fisher v. Farington*, Seton on Decrees, 280, ed. 2. See *ib.* ed. 3. p. 550.

(*k*) See *Rice v. Gordon*, 11 Beav. 271;

*Ridgway v. Clare*, 19 Beav. 111; *Woolley v. Gordon*, Taml. 11; *Paynter v. Houston*, 3 Mer. 297.

(*l*) *Ridgway v. Clare*, 19 Beav. 111.

ment of a debt due from both out of both their estates; and a fourth suit was instituted by the representatives of A. against the representatives of B. for taking the accounts of the partnership. The plaintiff in the third suit was found to be a creditor of both A. and B., but he was held by the Master not to be entitled to rank as a separate creditor of A. On an appeal from the decision of the Master, the Court thought it desirable that the separate creditors should be ascertained, but reserved the question whether the joint creditor was or was not entitled to rank as one of A.'s separate creditors. The judgment, however, is instructive, as it states the manner in which the Court administers the assets of a deceased partner, and pays each class of creditors. It appears that when there are assets sufficient to pay all the creditors, the estate of the deceased forms one fund, out of which the joint and separate creditors are paid *pari passu*; but that they, and the funds for their payment, are distinguished when the assets are in any way deficient.

It will be seen hereafter that in bankruptcy a creditor who holds a security cannot retain his security and prove for his whole debt, nor realize his security and prove for more <sup>Secured creditors.</sup> than the balance then remaining due to him: but in administering estates in Chancery, a creditor was entitled to prove for and receive dividends upon the full amount of his debt, and at the \*same time realize his security; so that until his debt \*1058 was satisfied his right of proof remained. (m)<sup>1</sup> This, however, has been altered by the Judicature Act, 1875. (n) A creditor is only entitled to be satisfied his debt, but until he is satisfied he

(m) *Bonser v. Cox*, 6 Beav. 84; *Mason v. Bogg*, 2 M. & Cr. 443; *Kellock's case*, 3 Ch. 769.

<sup>1</sup>Where partnership creditors have secured themselves by mortgage, they must abide by their contract, and are not preferred to individual creditors. *January v. Poyntz*, 2 B. Mon. 404.

A creditor of a partnership who has a mortgage on the separate property of one of the partners to secure him, is not required to resort to such property for payment. *Roberts v. Oldham*, 63 N. C. 297.

In a suit to foreclose a mortgage given by W. on his individual property in this state, as "additional security "

for the payment of a debt of a partnership of which he was a member, and for which debt the creditor also held a mortgage on lands belonging to the firm situated in Wisconsin,—*held*, that W. was not in the situation of a surety for his partner, so that he could compel a resort to the Wisconsin mortgage before the creditor could come upon him, because the mortgage was given to secure the note of the firm of which W was a member, and therefore he was personally liable therefor. *Tiffany v. Crawford*, 14 N. J. Eq. 278.

(n) § 10; the act only applies to the estates of persons dying after its commencement.

has a right in equity to prove for his whole demand against the estates of all his debtors.

The creditors of a partnership having, on the death of one of the partners, a right to obtain payment from the surviving partners, and out of the assets of the deceased partner, the question arises whether the creditors can enforce both these rights, or whether they can only avail themselves of one of them.

Before the Judicature Act, if the creditors proceeded at law against the surviving partners, but did not obtain satisfaction, they could afterwards proceed in equity against the estate of the deceased partner. (*o*)<sup>2</sup> So if the surviving partners became bankrupt, and the creditors of the firm proved against their estate and received a dividend, they might nevertheless afterwards proceed against the estate of the deceased. (*p*) Again, as the creditors of the firm could not in equity obtain any decree for payment by the surviving partners, but only a decree for payment out of the assets of the deceased partner, there was no reason why, even after a decree for the administration of the estate of the deceased, the creditors in question should not also proceed at law against the surviving partners. If, however, it could be shown that injustice would be produced by allowing the creditor to pursue both his remedies at once, the Court would perhaps have compelled him to elect between them, or have restrained him from proceeding at law. (*q*)

\*1059 \*The Judicature Acts have so far altered the practice as to allow one action to be brought against the surviving partners and the legal personal representatives of the deceased; and the creditor will practically obtain payment from the survivors or the estate as may be most convenient; but if the estate of the deceased is not sufficient to pay his separate creditors the creditors of the firm will not be able to compete with them, but will have to look to the surviving partners. (*r*)

(*o*) *Jacomb v. Harwood*, 2 Ves. S. 265; and the cases in the last note.

<sup>2</sup> See *ante*, 1053, note.

(*p*) *Heath v. Percival*, 1 P. W. 682; *Devaynes v. Noble* (Sleech's case), 1 Mer. 539.

(*q*) See, as to the considerations which guided the Court, *Ex parte Kendall*, 17 Ves. 525 and 526. If one partner be-

comes bankrupt, and a creditor of the firm proves against his estate, he cannot afterwards sue the bankrupt and his co-partners jointly. See *Bradley v. Millar*, 1 Rose, 273. The subject of election in bankruptcy will be examined hereafter.

(*r*) See *ante*, p. 1054, and Jud. Act, 1875, § 10.

If more than one partner is dead, a creditor of the firm may, in one action, obtain a judgment against the estates of all of the deceased partners.

One action against the executors of several deceased partners.

In a case before the late Vice-Chancellor Shadwell there was a partnership of seven persons, A., B., C., &c., and another partnership, A. and B., composed of two of the members of the first. A. and C. were dead. The surviving partners were bankrupt. The plaintiff, who was a creditor of both firms, filed a bill on behalf of himself and all other the creditors of A., and on behalf of himself and all other the creditors of C. against the real and personal representatives of A., the personal representatives of C., and the assignees of the bankrupts. The bill prayed that an account might be taken of what was due from A. and C. respectively to the plaintiff, and their other joint and separate creditors, and of the personal estates of A. and C. and of the real estate of A., and that the personal estates of A. and C. and the real estate of A. might be applied in payment of their respective debts, as well joint as separate. This bill was demurred to on the ground of multifariousness, but the Vice-Chancellor overruled the demurrer, and held the frame of the suit to be proper in point of form. (s)

Brown v. Douglas.

*b. With reference to what has occurred since death.*

Having now examined the position of the executors of a deceased partner, with reference to the creditors of the firm, and in respect of debts existing at the time of the death of the deceased, it is proposed to consider the liability of the assets of the deceased, and of his executors, in respect of what may have taken place since his death.

\*1060

With respect to the executors themselves, it is clear that if the executor of a deceased partner carries on the partnership business, the executor becomes personally liable to third parties as if he were a partner in his own right (t);<sup>1</sup> and if

Personal liability of executors.

(s) See *Brown v. Douglas*, 11 Sim. 283; *Brown v. Weatherby*, 12 Sim. 6. Since the Judicature acts it is a mere question of convenience whether there shall be one action or more.

(t) See *Wightman v. Townroe*, 1 M. & S. 412; *Labouchere v. Tupper*, 11

Moo. P. C. 198; *Ex parte Garland* 10 Ves. 119; *Ex parte Holdsworth*, 1 M. D. & D. 475. As to his liability to creditors by merely sharing profits with the surviving partners, see *Holme v. Hammond*, L. R. 7 Ex. 218, *ante*, p. 40.

<sup>1</sup>To make the executors of a deceased

the executor accepts or indorses bills of exchange or promissory notes either in his own name as executor (*u*), or in the name in which the deceased carried on business (*x*), the executor will be personally liable to be sued on such bills or notes. Whether in such cases the executor is entitled to be indemnified out of the assets of the deceased is altogether another question; and depends upon whether the executor has carried on the business pursuant to the

partner liable personally as partners with the surviving partner for the firm debts, it must appear that they voluntarily entered into such partnership and employed the testator's assets in the business of the same. It is not sufficient to so charge them that the business is carried on by surviving partner with the assent of the executors, and that they allow the testator's share of the capital to remain in the business for the benefit of the *cestuis que trust*, when it is done in accordance with the instructions of testator's will, or with the partnership agreement. *Richter v. Toppenhusen*, 39 How. Pr. 82.

A partnership was formed between J. and E., and the business conducted for some time, when, in 1842, J. died, leaving a will by which he appointed his wife, E., his partner, and M. his executors, to whom he devised his entire estate in trust for certain purposes. He directed that the business should be conducted after his death by E., and that the trustees under the will should not withdraw from the business of the firm any part of the capital which he had invested therein, unless it was necessary for them to do so in payment of his debts. The business was continued by E. according to the directions of the testator until 1857, when T. was taken into the firm, and an article of agreement entered into between E. acting in his own right, and jointly with the widow of J., and M., trustees under the will, and T., by which it was provided

that the business should be carried on under the old name, and should continue for a specified time—the net profits were to be divided into three equal parts, one of which was to go to E. in his own right, one to the trustees under the will of J., and the remaining part to T. It was also provided that in case of the death of E. his “executors or trustees, or both,” should hold the same relations to the firm as he did in his lifetime. This agreement was assented to by the heirs-at-law of J. Subsequently the widow of J. died, and in 1862, the article of agreement was continued for seven years, by E. acting for himself and jointly with M. as surviving executors and trustees of J., and by T. This contract was also assented to by the children of J. E. died leaving a will by which he provided for the continuance of his interest in the business. He appointed O. and D. his executors—the latter renounced, and the former became sole executor. The business was carried on in the same name and at the same place, until 1868, when the firm failed. An action was brought by a creditor of the firm against M., seeking to charge him as a partner for the debt. M. never participated in any way in the management of the business of the firm, nor exercised any control or supervision over the same, nor received any portion of the profits thereof directly or indirectly; and never gave any authority for the continuance of the firm after the death of E.: *Held*, that M. was not a

(*u*) *Liverpool Borough Bank v. Walker*, 4 DeG. & J. 24.

(*x*) *Lucas v. Williams*, 3 Giff. 150.

will of the deceased, or the directions of those beneficially interested in his estate.

With respect to the direct liability of the assets of the deceased to creditors, it may be taken as a general proposition, that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners;<sup>2</sup> and on that ground it has been held that they cannot be restrained at the suit of the executors of the deceased from continuing to carry on the business of the late firm in the old name. (*y*)

Liability of  
estate of de-  
ceased partner  
for what occurs  
after his death.

partner in the firm, and was not personally liable, as a partner, to a creditor of the firm. *Owens v. Mackall*, 33 Md. 382.

The legal representatives and widow of a deceased partner suffered his share to remain in the firm, which was continued for some years, when a new firm was formed between the surviving partner and the widow's second husband. She intervened in the contract, and consented that the balance due her as widow in community should remain with the new firm as a loan, on which she was to receive interest: *Held*, that she was a creditor of the new firm and not a partner. *Brower v. Creditors*, 11 La. Ann. 117.

If the administrators of a deceased partner ignorantly take the partnership books and collect some of the debts, they do not thereby become responsible to the surviving partner for all the partnership debts. *Alexander v. Coulter*, 2 S. & R. 494.

<sup>2</sup> See *post* 1063, note.

A clause in the partnership articles, that the partnership shall continue for a specified time notwithstanding the death of one or more of the partners, has not the effect, even in connection with the statute of Alabama of 1839, to render the administrator of the deceased partner liable at law upon a contract made by the survivors. *Edgar v. Cook*,

4 Ala. 588.

A stipulation in partnership articles, that, in case of the decease of either partner, the business may be carried on for one year by the survivor for the mutual benefit of both parties, does not, in case of the death of one partner, justify the allowance against his insolvent estate of a debt contracted by the survivor within the year, with one who had notice of the death. *Stanwood v. Owen*, 14 Gray, 195.

A company was formed to go to California. Among other articles of agreement was one that in case of the death of a party his nearest relatives should receive half his share of the profits, so long as the concern lasted: *Held*, not to be a partnership, and that the court had no equity power over it as such. *Knowlton v. Reed*, 38 Me. 246.

Where the mode of closing the business of a firm is by the creation of a new one, in accordance with the will of a deceased partner, composed of the surviving partner and the representatives of the deceased, the creditors of the new firm are clothed with the equities of that firm against the estate of the decedent arising out of the payment by the new firm of the debts of the old. *Laughlin v. Lorenz*, 43 Pa. St. 275.

(*y*) *Webster v. Webster*, 3 Swanst. 490, note. But see as to selling good will, *ante*, p. 860.

In the great case of *Devaynes v. Noble* (z), some bills deposited with a firm of bankers were, after the death of one of the partners, misapplied by the surviving partners, and an attempt was made to obtain out of the estate of the deceased the value of the bills so misapplied. But the attempt was not successful; Sir Win. Grant observing—

\*1061      \* “ If there be no remedy at law against the executors of Mr. Devaynes, I am at a loss to understand the equity on which this Court is to interpose to make good the loss against Mr. Devaynes' estate. It has not been incurred by anything that he did or neglected to do. The bills were safely kept as long as he had anything to do with them. From the act of placing them in the custody of a partnership, it followed that upon the death of one of the partners they would fall into the possession of the surviving partners. Mr. Houlton himself, therefore, has virtually placed them there. Mr. Devaynes' executors could not take them away; Mr. Devaynes could not direct his executors to take them away; and though Mr. Devaynes had neither been personally instrumental in the loss, nor personally benefited by it, nor could have prevented it, yet it is contended that it is upon his estate the loss ought to be thrown, and that by a court of equity. I apprehend, however, that it would be the reverse of equity to throw the loss on his estate in such a case as the present. It might be as well contended that if they had thrown the bills into the fire, or lost them by negligence, Mr. Devaynes would be responsible for such act or negligence. He had no more to do with the sale of the bills than he would have had to do with a loss occasioned by such means as these.”

Moreover, although an executor has power to dispose of the assets of the deceased, and to keep alive demands against them which would otherwise become barred by the statute of limitations, still the acts of an executor, to whatever extent they may render him personally liable, do not impose liability on the assets of the deceased, unless those acts have been properly performed by the executor in the execution of the trusts reposed in him. At the same time, there are acts which, if done by an executor, impose liability on the assets of the deceased (a); and, therefore, if a partner appoints a co-partner his executor, and dies, and the executor continues to carry on the business, it is possible that his acts, attributed to him, not as partner but as executor, may render the assets of the deceased liable for what may have occurred since his death. (b)

(z) *Houlton's case*, *Johne's case*, and *Brice's case*, 1 Mer. 616, etc. See, too, *Vulliamy v. Noble*, 3 Mer. 614.

(a) See *Williams on Executors*, vol. ii. p. 1636, etc., ed. 6, 1771, ed. 7.

(b) See *Vulliamy v. Noble*, 3 Mer. 614; but see *Farhall v. Farhall*, 7 Ch. 123, and *Owen v. Delamere*, 15 Eq. 134, and *ante*, p. 52.

If an executor of a deceased partner carries on the partnership business pursuant to directions contained in the will of his testator, the executor will, as already pointed out, render himself personally liable for debts contracted in so doing, but he will be entitled to indemnity in respect thereof out of the estate of the deceased; and consequently, if a deceased partner \*has himself directed his assets or any part \*1062 thereof to be employed in carrying on the partnership business, so much of them as are directed to be employed, are liable to make good the debts contracted during their employment. For these reasons, and to this extent, therefore, his estate will be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. In such a case, the creditors are better off than the creditors of ordinary partners, inasmuch as these last have nothing to look to except the property of the partners; whereas, in the case supposed, the creditors have not only the personal security of those who carry on the business, but also a right to be paid out of the assets of the deceased employed therein. (c)

Effect of employment of assets in the business of the firm.

The cases which have occurred upon this subject, have for the most part arisen where the executor, having continued the business with the surviving partner, and having become bankrupt with him, has endeavored to withdraw from the joint estate the assets of the deceased employed in the trade. In such cases, the executor has been held entitled to prove for the value of the assets which he embarked in the business without authority, such assets being in substance an unauthorized loan of trust money; but he has been held not entitled to prove as against joint creditors for the value of those assets which his testator authorized to be so continued in the business.

Proof by the executor in the event of bankruptcy.

In *Ex parte* Garland (d), a miller and farmer made a will whereby he directed his wife to carry on his business, and that for the purpose of enabling her to carry it on, any sum not exceeding 600*l.* should be advanced to her by his trustees. He also directed his wife to give her notes of hand for what might be advanced, and for the value of the stock, crops, and effects, in

*Ex parte* Garland.

[ (c) See the cases in the next two notes.

(d) 10 Ves. 110. See, also, *Ex parte* Butterfield, DeG. 570, and other cases

of that class, noticed hereafter under the head Bankruptcy; *Hall v. Fennell*, Ir. Rep. 9 Eq. 406, and on Appeal, 615.

his business. He appointed his wife and the trustees before al-  
luded to his executors. After his death, his widow carried on the  
business, the stock, crops, and effects in which were valued at  
1351*l.* 5*s.* 0*d.* She also received 600*l.* from the trustees for  
\*1063 the purpose of enabling her to carry on the \*business, and  
for these two sums she gave them her promissory notes.  
She also became indebted to the estate of the testator in a further  
sum of 768*l.* 12*s.* 4*d.* She then became bankrupt, and an attempt  
was made to prove as debts due from her to the estate of the de-  
ceased, these three sums of 1351*l.* 5*s.* 0*d.*, 600*l.*, and 768*l.* 12*s.* 4*d.*  
But it was held by Lord Eldon, that although the last sum might,  
the two first could not be proved against her estate; for they rep-  
resented property which the deceased had authorized to be embarked  
in trade, and which was therefore answerable to the creditors of the  
trade.

The above decision has been followed by others, and its propri-  
ety has never been questioned. (*e*)

The liability of the estate of a deceased partner to persons who  
Creditors be- who become creditors after his decease is subject to its  
fore death liability to those who were his creditors at his decease.  
preferred to  
subsequent  
creditors. These last must first be paid; and although, in such  
a case as *Ex parte* Garland, they might not be able to follow the  
assets of the deceased into the hands of the trustee in bankruptcy,  
yet, in administering the estate of a person whose assets have been  
employed in trade in pursuance of directions contained in his will,  
the creditors who have become such since his decease cannot com-  
pete with his other creditors. (*f*)

It has at various times been contended that when a testator  
Amount of directs a trade or business to be carried on after his  
estate liable decease, he thereby subjects *all* his assets to the pay-  
where assets ment of debts incurred in the course of carrying it on;  
are directed to be continued in the busi- and a decision by Lord Kenyon (*g*) has been supposed  
ness. to warrant such contention. It is now, however, clearly settled,

(*e*) See, in addition to the case last  
cited, *Ex parte* Richardson, Buck. 202,  
and 3 Mad. 138; *Thompson v. Andrews*,  
1 M. & K. 116; *Cutbush v. Cutbush*, 1  
Beav. 184; *Scott v. Izon*, 34 Beav. 434.  
In this last case it was attempted to  
make an executor responsible for not  
having proved, but the attempt failed,

owing mainly to lapse of time and the  
impossibility of taking the necessary  
accounts.

(*f*) See *Cutbush v. Cutbush*, 1 Beav.  
184.

(*g*) *Hankey v. Hammock*, Buck. 210,  
and 3 Madd. 148.

that the extent of the liability of the testator's estate does not exceed the amount authorized by him to be employed in the trade or business directed by him to be carried on (*h*); and it is generally admitted that \*the decision of Lord Kenyon is not in- \*1064 consistent with this doctrine. (*i*)

It becomes, therefore, a matter of considerable importance, not only to executors but to creditors, to ascertain what a testator who directs his trade or business to be carried on has authorized to be employed in carrying it on. Effect of general directions to carry on trade. This must, of course, depend on the terms of his will; but it has been held that a general direction to carry on a business in which the testator was engaged at the time of his death does not authorize

(*h*) See the cases in the last three notes, and *McNeillie v. Acton*, 4 DeG. M. & G. 744.

<sup>1</sup> *Cook v. Rogers*, 8 Am. Law Record, 641.

One partner may by will, provide for the continuance of the partnership after his death, by the consent of the surviving partner or partners, and may bind his whole estate for debts to be incurred by the partnership after his death, or only that portion of it invested in the partnership at the time of his death. *Cook v. Rogers*, *supra*.

In order, however, to bind the estate of a deceased partner, either by a partnership agreement or by will, for the payment of debts contracted by the partnership after his death, it is necessary that the most clear and unambiguous language should be used, showing clearly the intention to bind the general estate of the decedent, and not merely to bind his "share" or "interest" already embarked in the partnership at the time of his death. *Cook v. Rogers*, *supra*.

R., by a single clause in his will directed his executor to continue, keep up, and represent his shares and interests in three several partnerships, of each of which he was a member, until such time after his death as said executor should think it most advantageous to his estate

to sell out, or settle up and close the said shares and interests respectively, but did not use such language as to show that he intended to bind his general estate for the debts of either of these partnerships that might be incurred after his death. The partnerships were carried on after his death as directed. Two of them made large profits, which came into the hands of the executor. The other became insolvent: *Held*, that the creditors of the insolvent firm whose claims accrued after testator's death, had no right to be paid out of the profits of the successful partners any more than out of any other property of testator's estate not embarked in the insolvent partnership. *Cook v. Rogers*, *supra*.

A partner by his will, made his brother, who was his co-partner, executor, and devised to him the residue of his estate in trust for certain purposes, and authorized him to use in his business, the property given him in trust, until it should be wanted for distribution: *Held*, that the intent of the will was that the residue only should be used in business. and that the surviving partner was bound to settle the affairs, and pay the debts of the firm, in the usual way, notwithstanding this clause. *Re Clap*, 2 Lowell, 168.

(*i*) See the observations of Turner, L. J., in 4 DeG. M. & G. 744.

the employment, for the purposes of that business, of more of his assets than are embarked therein when he dies. (*k*) It has also been held, that a bequest by a person of money upon trust to allow it to remain in the concern of which he is a partner, does not necessarily empower the trustees to trade with that money; for the context may show that all the testator meant was that the sum in question should not be called in, but be allowed to remain outstanding as a loan to the surviving partners (*l*)

CONSEQUENCES OF DEATH AS REGARDS JOINT CREDITORS. !  
(Continued.)

2. *In the case of companies.*

The position of the executors of a deceased member of a company is, as regards the creditors of the company, *primâ facie* the same as the legal position of the executors of an ordinary partner with respect to the creditors of the firm. Whether the company is incorporated or unincorporated, its creditors have, *primâ facie*, no legal *locus standi* against executors; and unless the deceased was under a several as well as a joint liability to the creditors of the company, the latter can only proceed against the executors of the former in one of two cases: viz., first, where the creditors are specially empowered to do so by some statute; or, secondly, where the executors have themselves become shareholders, and liable as such to the debts of the company. Several cases have been decided in which executors, not being themselves shareholders, have been held not liable to creditors of companies.

With respect to the right of a creditor of a company to proceed against the executors of a deceased shareholder, a distinction must be taken between unincorporated and incorporated companies; for whilst the assets of a deceased shareholder in an unincorporated company are *primâ facie* liable to the debts of the company contracted before his decease, the assets of a deceased member of a body corporate are, *primâ*

Liability of  
executors of  
shareholders  
to creditors of  
companies.

Equitable  
liability of  
estate of de-  
ceased share-  
holder.

(*k*) See *McNeillie v. Acton*, 4 DeG. required.  
M. & G. 744, where further capital was (*l*) See *Travis v. Milne*, 9 Ha. 141.

*facie*, not liable to the payment of the debts thereof. But as regards both classes of companies, the position of executors in fact depends less on general principles than on particular statutes, the provisions of which must therefore not be overlooked. Thus, although banking companies governed by 7 Geo. 4, c. 46, are not corporate bodies, and although creditors of such companies are, it seems, entitled to obtain payment of their debts out of the assets of a deceased shareholder, still the creditors' rights are so far modified by the acts in question, that, whether they are creditors by specialty or by simple contract, the lapse of three years after the death of a shareholder bars their claims against his executors (*m*); and even within that period the executors are only liable to pay such debts as the surviving shareholders are unable to discharge. (*n*) Several cases are also to be found in which executors, not being themselves shareholders; have been held not liable to creditors. (*o*) Similar observations apply to actions for calls.

The liabilities of executors as contributories under the Winding-up acts, will be alluded to hereafter; it may, \*however, be observed, that their liability to \*1066 Executors as contributories. calls under those acts, is not governed by the principles applicable to ordinary partnerships, and is not confined to calls made for the payment of debts incurred by the company prior to their testator's decease. (*p*)

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### SECTION III.—CONSEQUENCES AS REGARDS THE SEPARATE CREDITORS, LEGATEES, AND NEXT OF KIN OF THE DECEASED.

In considering the consequences of the death of a partner or shareholder, as regards his separate creditors, and his legatees, or next of kin, it will be convenient, first of all, to examine their

(*m*) See *Barker v. Buttress*, 7 Beav. 134.

(*n*) *Heward v. Wheatley, Ex parte Wilson*, 5 DeG. & S. 552. Compare *Re Walton*, 23 Beav. 480.

(*o*) *Ness v. Armstrong*, 4 Ex. 21, where the executors had received dividends; *Powis v. Butler*, 3 C. B. N. S. 645, and 4 ib. 469, where the deceased's name was kept on the register of shareholders; *Poole v. Knott*, 7 W. R. 527,

where the deceased had died before the creditor had obtained judgment against the company. The doubt expressed in *Ricketts v. Bowhay*, 3 C. B. 889, is removed by the decision in *Ness v. Armstrong*, 4 Ex. 21; and the case of *Ness v. Bertram*, 4 Ex. 191, turned entirely on a point of pleading.

(*p*) See *Baird's case*, 5 Ch. 725; *Blakeley's case*, 13 Beav. 133, and 3 Mac. & G. 726.

rights under ordinary circumstances, and then to advert to the complicated questions which arise when the assets of the deceased, instead of being realized, are allowed by his executors to be employed in the business carried on by the firm or company to which he belonged, and when shares in companies are specifically bequeathed.

*Rights of separate creditors and legatees generally.*

Under ordinary circumstances, the separate creditors, legatees, and next of kin of a deceased partner, must look for payment of what is due to them out of his assets, to his legal personal representative, and to him alone. (*q*) The executors are, under ordinary circumstances, the only persons who have a right to call upon the surviving partners for an account;<sup>1</sup> and of this right they do not divest themselves by a sale and assignment of the share of the deceased; for the effect of such sale and assignment is only to make the executors trustees for the purchaser. (*r*)

A leading case illustrating the doctrine that the executors of a deceased partner are, under ordinary circumstances, the \*only persons entitled to require an account from the surviving partners, is *Stainton v. The Carron Company*. (*s*) There a bill was filed by the residuary legatees of a person who had been the agent of and a shareholder in a company, against his executors and other persons interested in the will of the deceased, and against the company. The bill charged that one of the executors was an agent and manager of the business of the company, and that he and another executor were large shareholders therein, and that a third executor was also an agent and manager, and was entitled under the will of the testator to ten shares in the company, and that all three executors had interests conflicting with their duties as executors and trustees; and the bill prayed (amongst other things) that the company might transfer the testator's shares to his executors, and that an account might be taken of what was due from the company to his estate, and for payment to the executors of

Legatees, &c.,  
of deceased  
partner must  
look to his  
executor.

\*1067

(*q*) *Alsager v. Rowley*, 6 Ves. 748; *Saunders v. Druce*, 3 Drew. 140. If there is no person who in this country represents the deceased, a representative will be appointed. See *Macleay v. Daw-*

son, 5 Jur. N. S. 1091.

<sup>1</sup> See *ante*, 945, and note.

(*r*) *Clegg v. Fishwick*, 1 Mac. & G. 294.

(*s*) 18 Beav. 146.

the amount to be found due. The company and one of the executors demurred, and their demurrers were allowed. In delivering judgment the Master of the Rolls thus summed up the effect of the cases on this subject:—

“The persons interested in the estate of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate.” And again: “To support such a bill as this it is not sufficient to prove that it may be an unpleasant duty to the executors and trustees to take the necessary steps for protecting property entrusted to them. It is not sufficient to show that it will be for their interest not to take such steps; it is necessary to show that they prefer their interest to their duty, and that they intend to neglect the performance of the obligation incidental to the office imposed upon them by the testator, and which they have undertaken to perform.”

The executors, it may be observed, have, in ordinary cases, a personal interest in getting in the assets of the deceased; for, if they willfully neglect so to do, they will be made to account for the assets, although they may not actually have received them. (*t*)

\*It must not, however, be supposed that in an action against the executor of a deceased partner by a separate creditor, legatee, or next of kin, no account of the deceased partner's share in the partnership can be decreed or taken; for it is the common course in such an action to direct an inquiry what is due to the estate of the deceased in respect of such share) (*u*) But before the Judicature acts in a suit of this description the surviving partners could only be treated as witnesses; no decree could be made against them for payment of what was due on the account, and the executors must, if necessary, have taken proceedings against them to obtain such payment. Now, however, all this can be done in one action. (*x*)

It seems that, under an ordinary judgment for the administration of the estate of a deceased partner, the partnership accounts will not

Willful default

\*1068 Taking partnership account in action against executor alone.

(*t*) See, as to charging the executor of a partner with willful default, *Grayburn v. Clarkson*, 3 Ch. 605; *Sculthorp v. Tipper*, 13 Eq. 232; *Ward v. Ward*, 2 H. L. C. 777, and *Rowley v. Adams*, ib. 726, and 7 Beav. 395; *Kirkman v. Booth*, 1 Beav. 273.

(*u*) As in *McDonald v. Richardson*, 1. Giff. 81. See, also, *Pointon v. Pointon*, 12 Eq. 547, where the only surviving partner was an executor and trustee.

(*x*) See Ord. xvi. r. 17, etc. and Ord. xvii.

be gone into, unless the judgment specially directs some inquiry to be made with reference to the share of the deceased. (*y*) But it is difficult to see how any account of his personal estate can be taken without such an inquiry; and it has been decided more than once, that if the surviving partners seek to obtain payment of a balance from the estate of the deceased on the partnership accounts, these accounts must be taken, although no special direction as to them may be contained in the judgment. (*z*)

Notwithstanding, however, the general rule that the separate creditors, legatees, or next of kin of a deceased partner have no *locus standi* against his surviving partners, this rule is by no means without its exceptions. Indeed there are cases to be met with, which apparently warrant the inference, that surviving partners may always be sued along with the executor or administrator of the deceased. (*a*)

But the authority of these cases has recently been called in question, and the better opinion now is that some special circumstances are necessary to justify such a course. (*b*)

The special circumstances which have been held sufficient are collusion between the executors and the surviving partners (*c*); refusal by the former to compel the latter to come to an account (*d*); dealings which may have precluded the executors from themselves obtaining any account (*e*); the fact that the executors are themselves partners and liable therefore to account as partners to themselves as executors (*f*); and generally, where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution, by the executors, of the rights of the persons interested in the estate of the deceased, against the surviv-

(*y*) See the next note.

(*z*) See *Paynter v. Houston*, 3 Mer. 297; *Baker v. Martin*, 5 Sim. 380; *Woolley v. Gordon*, Taml. 11.

(*a*) See *Newland v. Champion*, 1 Ves. S. 106, and 2 Coll. 46; *Bowsher v. Watkins*, 1 R. & M. 277.

(*b*) See *Davies v. Davies*, 2 Keen, 534; *Law v. Law*, 2 Coll. 41; *Travis v. Milne*, 9 Ha. 141; *Stainton v. The Carron Co.* 18 Beav. 146; *Yeatman v. Yeatman*, 7 Ch. D. 210.

(*c*) *Doran v. Simpson*, 4 Ves. 651; *Gedge v. Traill*, 1 R. & M. 281, note;

*Aslager v. Rowley*, 6 Ves. 748.

(*d*) *Burroughs v. Elton*, 11 Ves. 29; the prayer of the bill in this case may be usefully referred to. But see *Yeatman v. Yeatman*, 7 Ch. D. 210, where mere refusal was held not to be enough.

(*e*) *Law v. Law*, 2 Coll. 41, and on appeal, 11 Jur. 463; *Braithwaite v. Britain*, 2 Keen, 206.

(*f*) *Cropper v. Knapman*, 2 Y. & C. Ex. 338; *Travis v. Milne*, 9 Ha. 141; and see as to continuing the deceased's assets in the business, *post*, p. 1070.

ing partners, there it has been said, an action may be instituted by those persons against the executors and the surviving partners. (*g*)

If the surviving partners and the executors are different persons, and they have *bonâ fide* come to an account respecting the partnership affairs, and have settled such account as a final account, the account thus settled is binding, as between the surviving partners and the persons interested in the estate of the deceased partner, and cannot be impeached, save on the ground of fraud. (*h*) And the power of the executors of a deceased partner to make binding arrangements with the surviving partners is considerably enlarged by 23 & 24 Vict. c. 145, § 30, which enacts that,—

“It shall be lawful for any executors to pay any debts or claims upon any evidence they may think sufficient, and to accept any composition

\*or any security, real or personal, for any debts due to the deceased, and to allow any time for payment for any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration, all debts, accounts, claims and things whatsoever, relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases and other things, as they shall think expedient, without being responsible for any loss to be occasioned thereby.”

\*1070 23 & 24 Vic. c. 145, § 30.

But arrangements made between executors and surviving partners for the benefit of the executors individually are always liable to suspicion; and if the executors are themselves the surviving partners, or some of them, it becomes exceedingly difficult to make any arrangement which will be binding on the persons interested in the estate of the deceased; for even if any arrangement is assented to by such persons, it will be liable to be successfully disputed, on any of those numerous grounds which are held to invalidate arrangements between trustees and their *cestuis que trustent*, and by which trustees do, or may, obtain a benefit at the expense of the trust estate. A remarkable instance of this is afforded by the case of *Wedderburn v. Wedderburn* (*i*), where an account of a deceased partner's estate was directed, at the suit of the persons beneficially interested therein, although thirty

Where executors are personally interested.

(*g*) *Travis v. Milne*, 9 Ha. 150. As to discovery by the surviving partners, see *Leigh v. Birch*, 32 Beav. 399, and Ord. xxxi. r. 8.

(*h*) *Davies v. Davies*, 2 Keen, 534;

*Smith v. Everitt*, 27 Beav. 446; *Yeatman v. Yeatman*, 7 Ch. D. 210.

(*i*) 2 Keen, 722, and 4 M. & Cr. 1 noticed *ante*, p. 987.

years had elapsed since his death, and several changes had taken place in the firm, and releases had been given to the executors by their *cestuis que trustent*. (*k*)

*Rights of separate creditors and legatees when the share of the deceased is not got in.*

Executors, unless authorized by their testator so to do, ought not to leave his assets outstanding in the trade or business in which he was engaged when he died. It has been laid down as a rule without exception, that to authorize executors to carry on a trade, or to permit it be carried on with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and \*1071 \*direction given by the testator for that purpose. (*l*)<sup>1</sup> A

• bequest of his share and interest in the partnership to one person for life, and then to another, does not, without more, warrant the trustees of his will in keeping such share and interest unconverted into money; and it is therefore their duty to realize it, and invest what they receive for the benefit of the legatees. (*m*)

If a testator's capital is left in the business as a loan to the surviving partners, they are only liable to pay interest on it, even although they do not pay it off when they ought (*n*); but where an executor improperly employs the assets of the testator in a business carried on by himself, he is chargeable, at the option of the persons beneficially interested in the estate of the deceased, either with the sum employed and interest thereon at 5*l.* per cent., or with the sum employed and the profits made by its employment. (*o*) And such persons are not deprived of this option by the circumstance that it will be difficult and expensive to ascertain what part of the profits has arisen from the employment of the

(*k*) See the other cases as to profits accruing since death, *ante*, p. 982 *et seq.*

(*l*) *Kirkman v. Booth*, 11 Beav. 273. A power to executors named in a will to carry on a business does not justify an administrator in so doing if all the executors renounce. *Lambert v. Rendle*, 3 New R. 247.

<sup>1</sup> See, *ante*, 1063, note.

(*m*) *Kirkman v. Booth*, 11 Beav. 273. See *Skirving v. Williams*, 24 ib. 275.

(*n*) See *Vyse v. Foster*, L. R. 7 H. L. 318, and 8 Ch. 300, noticed *ante*, p. 989, and see *infra*.

(*o*) See *Docker v. Somes*, 2 M. & K. 655; *Palmer v. Mitchell*, ib. 672, note; *Heathcote v. Hulme*, 1 J. & W. 122.

assets of the deceased; for whatever difficulty may exist is attributable to the conduct of the executor himself, and cannot therefore be effectually urged by him as a reason why no account of profits should be taken. (*p*) The *cestuis que trustent* are moreover entitled to compound interest if the duty of the executors is to call in their testator's capital, and invest it and accumulate the income (*q*); but they are not entitled to profits for part of the time and to interest for the rest unless there has been some intervening settlement of account (*r*), or rather special circumstance. (*s*)

\* It follows from the doctrine above stated, and from the \*1072 principles which were explained when treating of judgments for an account (*t*), that if one of two partners <sup>Profits made since death.</sup> makes the other his executor, and dies, the surviving partner must, under ordinary circumstances, not only account to the estate of the deceased for what may be due, in respect of the testator's share in the partnership at his death (*u*), but also for the profits made by him since his death, by the employment of his capital in the business carried on by the late firm. (*x*) Moreover, it is immaterial whether such business has been continued by the surviving partner alone, or by him and others in partnership with him, for the obligation of the executor thus to account, is founded on a breach of trust committed by him, for which he is liable, at all events, to the extent to which he has benefited by it, whether other persons are also liable or not; and being founded on a breach of trust, an action in respect of it may be sustained against the executor alone, though he may only be one of several, by whom the profits have by whom the profits have been made. (*y*)

The cases illustrating the right of legatees to an account of profits made since their testator's death where the executors have continued his assets in the business in which he was a partner have been already adverted to at considerable length. (*z*) The following classified list of them is inserted here for reference:

(*p*) *Docker v. Sones*, 2 M. & K. 655; 122.  
*Townend v. Townend*, 1 Giff. 201; *Flockton v. Bunning*, 8 Ch. 323, note, *ante*, p. 985.

(*q*) See *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, *ib.* 461. Possibly, also, in some other cases. See the observations in *Vyse v. Foster*, L. R. 7 H. L. 346.

(*r*) *Heathcote v. Hulme*, 1 J. & W.

(*s*) As in *Townend v. Townend*, 1 Giff. 201, noticed *ante*, 983.

(*t*) *Ante*, p. 974 *et seq.*

(*u*) See the cases cited, *infra*, pp. 1072, 1073.

(*x*) *Phillips v. Phillips*, Finch 410.

(*y*) See *ante*, p. 978.

(*z*) *Ante*, p. 976, *et seq.*

1. *Account of subsequent profits decreed.*

## A. Executors against surviving partners.

Brown v. De Tastet, Jac. 284 (*ante*, p. 982).  
 Booth v. Parks, 1 Moll. 465, and Beatty, 444.  
 Featherstonhaugh v. Turner, 25 Beav. 382.  
 Smith v. Everitt, 27 Beav. 446.

B. Legatees against executors who were not partners, but who continued his assets in his business.

Heathcote v. Hulme, 1 J. & W. 122.  
 Docker v. Somes, 2 M. & K. 654.  
 Palmer v. Mitchell, 2 M. & K. 672, note.

\*1073 C. Legatees against executors who were surviving partners or who became partners.

Cook v. Collingridge, Jac. 607 (*ante*, p. 983).  
 Stocken v. Dawson, 9 Beav. 239, and on appeal, 27 L. J. Ch. 282.  
 Wedderburn v. Wedderburn, 2 Keen, 722, and 4 M. & Cr. 21 (*ante*, p. 987).  
 Townend v. Townend, 1 Giff. 201 (*ante*, p. 983).  
 Macdonald v. Richardson, 1 Giff. 995 (*ante*, p. 985).  
 Willett v. Blanford, 1 Ha. 253 (*ante*, p. 980). In this case accounts of subsequent profits were directed without prejudice to any question.  
 Flockton v. Bunning, 8 Ch. 823, note, and *ante*, p. 935.

2. *Account of subsequent profits refused.*

## A. Executor against surviving partner.

Knox v. Gye, L. R. 5 H. L. 656, the statute of limitations being a bar.

B. Legatee against executors, one of whom was a surviving partner, and the other of whom had become a partner.

Simpson v. Chapman, 4 De G. M. & G. 154 (*ante*, p. 986).  
 Vyse v. Foster, L. R. 7 H. L. 318, and 8 Ch. 300 (*ante*, p. 989).  
 See, also, Wedderburn v. Wedderburn, 22 Beav. 84, and Willett v. Blanford, 1 Ha. 253 (*ante*, pp. 987 and 980).

Upon the principle that every one concerned in a breach of trust with notice of the trust is answerable for such breach, it follows that if a partner dies, and his surviving partners allow his assets to remain in their business, with the knowledge that to suffer them so to re-

Liability of surviving partners for assets improperly continued in the business.

main is a breach of trust on the part of the executors, the surviving partners will be themselves responsible to the separate creditors, legatees, or next of kin of the deceased, for any loss which may be thereby sustained (*a*). And further, inasmuch as it is, *primâ facie*, a breach of trust for executors to allow the assets of the deceased to remain in the business carried on by him at his death, surviving partners who knowingly carry on the business with assets of the deceased thus left in their hands will be answerable for such assets, unless they can show that no breach of trust was in fact \*committed. (*b*). Their liability to account for \*1074 profits has already been considered (*c*).

Where, however, the surviving partners and the executors are different persons, and the executors distinctly lend part of their testator's assets to his surviving partners, the latter are only liable to pay interest for it, at the rate agreed upon with the executors. In such a case the legatees are not entitled to a share of the profits made by means of the money lent, although in lending it the executors may have been guilty of a breach of trust, and the borrowers may have known that the money belonged to the deceased (*d*). *A fortiori*, if the executors are authorized to lend part of the assets of the deceased to his surviving partners, they will not be accountable for the profits they may make by the employment in their trade of money lent to them by the executors in pursuance of their authority (*e*): nor, in such a case as is now supposed, will the executors be responsible for the money if lost, if they took such security for its repayment as having regard to the will of the testator, it was their duty to take (*f*).

It sometimes happens that the executor of a deceased partner is taken into partnership by the surviving partners, and a question then arises whether the profits received by the executor as partner belong to him personally, or to the estate which he represents. This must depend on the circumstances under which the executor became a partner. If he became a part-

Loans by ex-  
ecutors.

Executor be-  
coming a  
partner.

(*a*) See *Wilson v. Moore*, 1 M. & K. 127 and 337; *Booth v. Booth*, 1 Beav. 125, and compare *Ex parte Barnewall*, 6 De G. M. & G. 801.

(*b*) *Travis v. Milne*, 9 Ha. 141.

(*c*) *Flockton v. Bunning*, *ante*, p. 985.

(*d*) See *Stroud v. Gwyer*; 28 Beav. 130; *Flockton v. Bunning*, 8 Ch. 823, note, and *ante*, p. 985; 23 & 24 Vict. c.

145, § 30.

(*e*) *Parker v. Bloxam*, 20 Beav. 294; *Vyse v. Foster* L. R. 7 H. L. 318, and 8 Ch. 300, *ante*, p. 989, where the testator's capital was not got in at the time appointed, and one of the executors was a surviving partner.

(*f*) *Paddon v. Richardson*, 7 De G. M. & G. 563.

ner in his representative character, or, as in *Cook v. Collingridge* (*g*), under circumstances entitling the legatees to treat him still as their trustee, he must account for any profits which he may have obtained as a partner. On the other hand, if, as in *Simpson v. Chapman* (*h*), he became a partner, not in his representative \*1075 character, nor under such circumstances as those above mentioned, the profits accruing to him as a partner will be his own, and not form part of the assets for which he must account as executor.

*Specific bequests of shares.*

A specific bequest by a partner of his share in the partnership Legacy of a clearly does not entitle the legatee to become a partner share in a himself unless there is some agreement to that effect partnership. binding upon the surviving partners. The right of the legatee is simply to be paid the amount due to the testator at the time of his death in respect of his share (*i*); and also under the circumstances and subject to the qualifications already noticed (*k*), to receive a proportion of the profits made since the testator's death. As between the legatee, however, and the executor, the legatee is entitled to have the share kept in the business, subject only to the superior right of the executor to sell the testator's personal estate for the payment of debts. (*l*)

A bequest of a partner's capital has been held to include what was due to him in respect of advances. (*m*)

It has been held that the legatee of a deceased partner's share in the good-will of the partnership business could not sue Legatee of the surviving partners for a sale of the good-will and good-will. payment of his share, although the bequest had been assented to by the executors. (*n*) This case was somewhat peculiar, as in truth the surviving partner was entitled to everything which gave a saleable value to the good-will. (*o*)

(*g*) *Jac.* 607, *ante*, p. 983.

(*h*) 4 *De G. M. & G.* 154, *ante*, p. 986.

(*i*) *Farquhar v. Hadden*, 7 *Ch.* 1.

(*k*) *Ante*, p. 1072.

(*l*) See *Fryer v. Ward*, 31 *Beav.* 602, where the legatee had an option.

(*m*) *Bevan v. A.-G.*, 4 *Giff.* 361. A bequest of the use of capital employed in trade gives an absolute interest in it. See *Terry v. Terry*, 33 *Beav.* 232.

(*n*) *Robertson v. Quiddington*, 29 *Beav.* 529.

(*o*) See on this subject, *ante*, p. 859.

A specific bequest of a share in a partnership will be adeemed if the testator, after he has made his will, leaves the firm and receives his share; but so long as he remains a partner, there will be no ademption, although by some agreement subsequent \*to the date of the will, the amount of his share may have been varied. (*p*)

Ademption of  
legacies of  
shares.

\*1076

A legatee is not entitled to receive, out of the estate of his testator, any part of the bounty intended for him by the testator, until the legatee has paid all his own obligations in the shape of debts owing to the testator's estate. This principle is strongly illustrated by *Smith v. Smith*. (*q*) There a father who had advanced money to a firm in which his son was a partner, died, having bequeathed part of his residuary estate to the son. The father's executors were held entitled to retain the whole amount of the partnership debt out of the son's share of the residue, although the debt was barred by the statute of limitations when the father died.

Legacy to  
partner in-  
debted to  
testator.

*Smith v.*  
*Smith.*

Shares in companies will not ordinarily pass under a bequest of moneys, bonds, or securities. (*r*) But under special circumstances they will pass even under a bequest of money, as in *Knight v. Knight* (*s*), where share certificates were in an envelope endorsed "to be considered as money and given to A. B." A bequest of shares will ordinarily pass stock. (*t*)

Legacies of  
shares in com-  
panies.

Where a person entitled to various kinds of shares in a company bequeaths some of them without saying which in particular, the legatee can select which he pleases. (*u*)

A legacy of shares in a company is not adeemed by the conversion of such shares into stock (*v*); nor, necessarily, by the amalgamation of that company with another. (*x*)

A legatee of shares may, of course, decline to accept them, and he may do so although he accepts another legacy under the same will. (*y*)

(*p*) *Buckwell v. Child*, Anst. 260; *Ellis v. Walker*, ib. 309.

(*q*) 3 Giff. 263.

(*r*) *Huddleston v. Goldsbury*, 10 Beav. 547; *Ogle v. Knipe*, 8 Eq. 434; *Collins v. Collins*, 12 Eq. 454.

(*s*) 2 Giff. 616.

(*t*) *Morrice v. Aylmer*, 10 Ch. 148; *Trinder v. Trinder*, 1 Eq. 695. *Oakes v. Oakes*, 9 Ha. 666, *contra* cannot be

relied on on this point; *Morrice v. Aylmer*, 10 Ch. 148, was affirmed on Appeal. See L. R. 7 H. L. 717, and *Oakes v. Oakes*, 9 Ha. 666, was overruled.

(*u*) *Millard v. Bailey*, 1 Eq. 378.

(*v*) *Oakes v. Oakes*, 9 Ha. 666, and the last note but one.

(*x*) See *Phillips v. Turner*, 17 Beav. 194.

(*y*) *Long v. Kent*, 6 N. R. 354.

Absolute legacies.

Where a share in a company is bequeathed to a person absolutely, the executors should transfer it to the legatee as soon as possible, in order that the liability of the testator's estate in \*respect of it may be put an end to. (z) If the legatee is not *sui juris*, and the share cannot be transferred into his name, the position of the executors becomes embarrassing. If, however, they do nothing with the share, but simply take the dividends as executors, they will not render themselves personally liable to creditors (a); nor will they be liable to be made contributories, otherwise than in their representative capacity. (b) But it may happen that, unless the executors transfer the shares into the names of themselves or some other persons, the shares will become forfeitable; and in that case (the legatee of the share being still supposed to be not *sui juris*) the executors should, for their own protection, apply for the direction of the Court.

Legacies for life.

Where shares are bequeathed to one person for life with remainder to another, they ought nevertheless to be sold, unless it is clearly the testator's intention that they shall be retained *in specie*. (c) If they are intended to be enjoyed *in specie*, the position of the executors again becomes embarrassing; for if they transfer the shares into the name of the tenant for life, there is nothing to prevent him from selling them for his own use; and in case of a sale of the shares by him, the remainderman would naturally seek to make the executors responsible for their loss. If, on the other hand, the executors procure the shares to be transferred into their own names as trustees for the legatees, a personal liability in respect of the shares will be incurred by the executors, and that liability will not be limited by the amount of the assets of the testator. Unless, therefore, the executors can retain the shares without transferring them, they should, for their own safety, apply for the direction of the Court.

Where shares are bequeathed to one person for life, with remainder to another, and are transferred into the name of the tenant for life, they will, on his death, be transferable into the \*name of the remainderman without

(z) See Keene's Executors' case, 3 DeG. M. & G. 272.

(a) Ness v. Armstrong, 4 Ex. 21.

(b) This subject will be adverted to hereafter when treating of Contributo-

ries.

(c) See Blann v. Bell, 2 DeG. M. & G. 775; Thornton v. Ellis, 15 Beav. 193; Crowe v. Crisford, 17 ib. 507; and see as to shares in partnerships, *ante*, 1070.

being covered by the probate duty payable in respect of the tenant for life's estate. (*d*) Such shares, in fact, form no part of his estate, and are covered by the duty payable in respect of the estate of the original testator.

Where shares are bequeathed, not specifically, to one person for life, and after his death to another, the money yielded by them before sale will not necessarily belong to the <sup>Income before sale.</sup> tenant for life; for, according to the case of *Dimes v. Scott* (*e*), the tenant for life is only entitled to the income which would have been obtained if the shares had been sold and the produce invested in consols, at the end of the year from the testator's death: the income thus ascertained being, however, paid from the date of the death. This rule applies where the testator's residuary estate consists of shares when he dies. But it has been held that the rule does not apply where the executors themselves make an unauthorized investment; and that in such a case the tenant for life is entitled to the income actually yielded by the investment, and the remainderman is not entitled to more than a restoration of the original capital. (*f*)

When the legacy is specific, the rule in *Dimes v. Scott* does not apply, the legatee taking whatever the shares may yield. (*g*) So where the shares, although not specifically bequeathed, are directed by the will not to be sold for a certain time, what they yield during that time will belong to the tenant for life. (*h*)

It appears to be now settled, that when shares are specifically bequeathed, and the will contains no special directions to the contrary, all calls made upon the shares in the <sup>Payment of calls.</sup> testator's lifetime must be borne by his general personal estate; whilst all those made after his death must be borne by the legatee taking the shares. (*i*) There are, indeed, cases which show that \*calls made after the testator's death are payable out \*1079 of his general estate, and not by the specific legatee (*k*);

(*d*) *Hennell v. Strong*, 25 L. J. Ch. 407.

(*e*) 4 Russ. 195, and see *Fearn v. Young*, 9 Ves. 549.

(*f*) See *Stroud v. Gwyer*, 28 Beav. 130.

(*g*) *Infra*.

(*h*) See *Green v. Britten*, 1 DeG. J. & Sm. 649. Where the sale is postponed

by the Court for the benefit of infants, see *Lambert v. Rendle*, 3 N. R. 247.

(*i*) See *Re Box*, 1 Hem. & M. 552, and *Day v. Day*, 1 Dr. & Sm. 261, where all the previous cases are reviewed. See, also, *Bevan v. Waterhouse*, 3 Ch. D. 752, as to a direction to pay calls out of income and not out of capital.

(*k*) *Blount v. Hipkins*, 7 Sim. 51,

but these cases are not to be relied upon, except where the payment of the calls would have been a condition precedent to the completion of the testator's own title to the shares if he himself had lived (*l*), and the calls are made before the specific legatee is, by the terms of the will, to have the shares. (*m*)

Where shares are specifically bequeathed, and calls upon them are payable out of a testator's residuary estate, a fund ought to be set apart for the indemnity of the specific legatee (*n*); but, where the assets of the deceased are insufficient for the payment of his debts, no fund to meet future calls ought to be set apart to the prejudice of even simple contract creditors. (*o*)

A specific legatee of a share in a partnership or company is entitled to all ordinary profits and dividends declared after the testator's death (*p*); unless although declared after his death they were earned and ought to have been declared before. (*q*) But profits or dividends declared before a testator's death (*r*), or declared afterwards when they were earned and ought to have been declared before (*s*), *prima facie* form part of his general estate, and do not pass to the specific legatee of the share; and the same rule applies to dividends declared before his death, but the actual payment of which is postponed until afterwards. (*t*) But there may be special circumstances excluding this rule. (*u*)

A dividend declared before the death of a tenant for life, but not payable until afterwards, belongs to his estate, and not to the remainderman. (*x*)

Clive *v.* Clive, Kay, 600; Jacques *v.* Chambers, 4 Ra. Ca. 499, correcting S. C. 2 Coll. 435; Wright *v.* Warren, 4 DeG. & S. 367.

(*l*) As to this qualification, see Armstrong *v.* Burnet, 20 Beav. 424; Ad-dams *v.* Ferick, 26 ib. 384; and Day *v.* Day, *ubi supra*.

(*m*) *Re* Box, 1 Hem. & M. 522, where the testator's residuary estate, including the shares, was bequeathed to A for life, and after his death the shares were specifically bequeathed to B, and the calls were made in A's lifetime.

(*n*) Jacques *v.* Chambers, 4 Ra. Ca. 499.

(*o*) Wentworth *v.* Chevell, 3 Jur. N. S. 805. See, too, Read *v.* Blunt, 5 Sim.

567, and compare Atkinson *v.* Grey, 1 Sim. & G. 577. See *ante*, p. 1049.

(*p*) Jacques *v.* Chambers, 2 Coll. 435; Wright *v.* Warren, 4 DeG. & S. 367; Browne *v.* Collins, 12 Eq. 586; Ibbotson *v.* Elam, 1 Eq. 188.

(*q*) Browne *v.* Collins, 12 Eq. 586. But see Ibbotson *v.* Elam, 1 Eq. 188.

(*r*) See the next two notes.

(*s*) Browne *v.* Collins, 12 Eq. 586.

(*t*) De Gendre *v.* Kent, 4 Eq. 283; Lock *v.* Venables, 27 Beav. 598; Wright *v.* Tuckett, 1 J. & H. 266.

(*u*) As in Clive *v.* Clive, Kay, 600, which turned on the special wording of the company's deed of settlement.

(*x*) Wright *v.* Tuckett, 1 J. & H. 266.

In determining the relative rights of a tenant for life, and a remainderman of shares specifically bequeathed, a distinction is taken between dividends and bonuses, *i. e.*, between payments in respect of profits recently accrued and properly divisible as such, and payments in respect of accumulations of profits forming part of a company's capital. Payments of the first kind, whether called dividends or bonuses, or partly one and partly the other, are income, and belong to the tenant for life, if the sum payable is ascertained and declared after the testator's death (*y*); whilst payments of the last kind are treated as capital, and ought to be invested. (*z*) But these rules are subject to exception; and a dividend declared after a testator's death in respect of profits recently accrued must be treated as capital, if it has been lawfully capitalized by the company or the partners. (*a*) On the other hand, in *Maclaren v. Stainton* (*b*), a bonus arising from money paid to a company under a compromise with one of its own shareholders was held payable to the specific legatee of his shares, and not to his residuary legatee.

Distinction between dividends and bonuses.

\*Where part of the profits accruing during the life of the tenant for life are capitalized by the company, he has no right to have the loss of income, which he hereby sustains, made good by the remainderman. (*c*)

\*1081      Loss of income by tenant for life.

Interest on a debt accrues *de die in diem*, and is apportionable at common law; and shares of profits and dividends are now apportionable under the act 33 & 34 Vict. c. 35. If, therefore, a testator bequeaths debentures to one person for life, and afterwards to another, and dies shortly before the current interest on the debentures is payable, so much only of that interest as accrued after the death of the testator will belong to the tenant

Apportionment of interest and dividends.

(*y*) Compare *Hopkins' trust*, 18 Eq. 696; *Plumbe v. Nield*, 6 Jur. N. S. 529; *Price v. Anderson*, 15 Sim. 473; *Preston v. Melville*, 16 ib. 163; and *Barclay v. Wainwright*, 14 Ves. 66 (in which the payments were held to be income), with the cases in the next note.

(*z*) *Straker v. Wilson*, 6 Ch. 503; *Ward v. Comb*, 7 Sim. 634; *Witts v. Steere*, 13 Ves. 363; *Paris v. Paris*, 10 Ves. 185; and *Brander v. Brander*, 4 Ves. 800, in which the payments were held to be capital. See, also, *Cuming*

*v. Boswell*, 2 Jur. N. S. 1005, where the House of Lords held, that upon the true construction of a Scotch deed, bonuses belonged to an infant's estate, and not to the person who, on his death under 21, became entitled to the stocks which yielded them.

(*a*) *Barton's Trusts*, 5 Eq. 238. See, also, *Straker v. Wilson*, 6 Ch. 503.

(*b*) 3 DeG. F. & J. 202, reversing 27 Beav. 460.

(*c*) See *Stroud v. Gwyer*, 28 Beav. 130.

for life. (*d*) And it is apprehended that now if there is a specific bequest of shares in a company, and the testator dies a few days before a dividend upon them is declared, there will be a similar apportionment of the dividend (*e*); but the same rule does not apparently apply to bequests of shares in partnerships. (*f*)

Other circumstances being the same, the price of shares in dividend-paying companies naturally rises as a dividend day approaches; in fact, the price includes a proportionate part of the accruing dividend; nevertheless, as between a tenant for life and a remainderman the price realized by a sale of shares is all treated as *corpus*, without reference to the time when a sale is made (*g*); and it is conceived that the statute 33 & 34 Vict. c. 35 has not altered the law in this respect.

Where shares are bequeathed to executors upon trust for sale as soon as conveniently may be after the testator's death, they should sell them within a year after his death: and in a case where they were kept unsold for many years and the company was ultimately wound up, the estate of a deceased executor who survived the testator only thirteen months was held liable for the loss sustained by not having sold them within the year (*h*).

Liability of ex-  
ecutors for not  
selling shares.

\*1082

(*d*) See Rogers' Trusts, 1 Dr. & Sm. 338.

(*e*) Pollock v. Pollock, 18 Eq. 329, correcting Whitehead v. Whitehead, 16 Eq. 529. In Jones v. Ogle, 14 Eq. 419, affirmed on appeal, 8 Ch. 192, there was no apportionment, but there not only the shares but the dividends on them were specifically bequeathed. See, before the act, Maxwell's trusts, 1 Hem- & M. 610; Bates v. Mackinley, 31 Beav. 280; Clive v. Clive, Kay, 600; Hartley v.

Allen, 4 Jur. N. S. 500.

(*f*) See Jones v. Ogle, 8 Ch. 192. See, before the act, Ibbotson v. Elam, 1 Eq. 188; Johnston v. Moore, 27 L. J. Ch. 453; Browne v. Collins, 12 Eq. 586.

(*g*) Scholefield v. Redfern 2 Dr. & Sm. 182. See, also, Freeman v. Whetbread, 1 Eq. 266.

(*h*) Grayburn v. Clarkson, 3 Ch. 605; Sculthorpe v. Tipper, 13 Eq. 232. Compare Marsden v. Kent, 5 Ch. D. 598.

## CHAPTER II.

JOINT-STOCK COMPANIES IN THE UNITED STATES.<sup>1</sup>1. *Joint-Stock Companies Existing Independent of Statutory Regulation.*

Unincorporated joint-stock companies, as they exist in the United States, are, with the exception perhaps of those organized under the statutes of New York, merely co-partnerships; and, as a general thing, subject to all the rules governing that branch of the law.<sup>2</sup> The shareholders are, therefore, each personally liable for all

<sup>1</sup> In this chapter it is not proposed to treat of English joint stock companies, that subject having been already sufficiently treated in professed works upon that subject, nor of joint stock corporations, that subject belonging more properly in a work upon corporations, but of unincorporated joint stock companies and of those companies organized under the New York statutes upon the subject, which, while possessing many, if not most, of the attributes of corporations, are not such to every intent and purpose. These companies, though organized in the State of New York, do business in many other States of the Union, so that the law concerning them has much more than a local importance.

<sup>2</sup> *Vigers v. Sainet*, 13 La. 300; *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Manning v. Gasharie*, 27 Ind. 399; *Hedge's Appeal*, 63 Penn. St. 273; *Tappan v. Bailey*, 4 Met. 535; *Robbins v. Butler*, 24 Ill. 387; *Babb v. Reed*, 5 Rawle, 151; *Lafond v. Deems*, 52 How.

Pr. 41; S. C. 1 Abb. N. C. 318; *Wells v. Gates*, 18 Barb. 554; *Dennis v. Kennedy*, 19 Barb. 517; *Townsend v. Goewey*, 19 Wend. 424, 428; *Cross v. Jackson*, 5 Hill, 478; *Williams v. Bank of Mich.*, 7 Wend. 539; in re *Fry, Treas.*, etc., 4 Phila. 129; *Kramer v. Arthurs*, 7 Penn. St. 165.

"Mere partnerships, as to every person except their own stockholders, they never having been legally incorporated. Whatever name such a company may assume and use in the transaction of its business, it is a partnership, and not a corporate designation." *Williams v. Bank of Mich.* 7 Wend. 539, 542, per *Walworth*, Chancellor. See, also, *Skinner v. Dayton*, 19 John, 537; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98; *Butterfield v. Beardsley*, 28 Mich. 412.

See, however, *Livingston v. Lynch*, 4 John. Ch. 573, 592, where it was said by Chancellor Kent that the evident character of the members of the company in that case was that of tenants in common, in which each had a dis-

the debts of the company, no matter what the private arrangements among themselves may be;<sup>1</sup> and this notwithstanding they attempt to arrogate to themselves the attributes of corporations by doing business under a corporate name, and appointing certain of their members to act as directors.<sup>2</sup> The fact that the members call themselves stockholders and the firm an association, and that the number of members is considerable, makes not the slightest difference as to the real nature of the association.<sup>3</sup> In all actions at law by and against such unincorporated associations, all the members must be made parties to the same, as in the case of an ordinary partnership. No action can be maintained by or against the association in the character of a society possessing corporate rights.<sup>4</sup> Nor can such an association sue in the name of

tinct though undivided interest in the establishment, and an entire dominion over his own share or proportion of the property, but without any right or power to bind the interest or regulate the enjoyment of the property of the other members. This position of Chancellor Kent was approved in 1852, by Taggart, P. J., in *Irvine v. Forbes*, 11 Barb. 587.

Persons associating themselves together under articles to purchase property and to carry on a manufacturing business, if their organization be so defective as to come short of creating a corporation within the statute, become in legal effect partners. *Whipple v. Parker*, 29 Mich. 370.

<sup>1</sup> *Robbins v. Butler*, 24 Ill. 387; *Hess v. Werts*, 4 S. & R. 356; *Vigers v. Sainet*, 13 La. 300; *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Manning v. Gasharie*, 27 Ind. 399; *Hedges' Appeal*, 63 Pa. St. 273; *Tappan v. Bailey*, 4 Met. 535; *Cutler v. Thomas*, 25 Vt. 73. See, also, *Skinner v. Dayton*, 19 John. 537; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98.

Where the articles of association provided that persons having dealings with the company should not have recourse for their debts against the sep-

arate property of its members, but should be considered as having given credit to their *joint funds solely*; and that the trustees or agents of the company should have no authority to bind it by any contract, unless it contained a restriction to that effect: *Held*, that plaintiff having done work for the company under a contract by parol and attended with no such restriction, might maintain an action, not upon the contract itself, but upon the *quantum meruit*, either against the agents as having made themselves personally liable, or against the individuals composing the association, on the ground that they had received the benefit of the plaintiff's labor. *Sullivan v. Campbell*, 2 Hall, 271.

<sup>2</sup> *Hess v. Werts*, 4 S. & R. 356; *Williams v. Bank of Mich.* 7 Wend. 539; 542, per Walworth, Chancellor (cited *supra* in note); *McGreary v. Chandler*, 58 Me. 537.

<sup>3</sup> *Wells v. Gates*, 18 Barb. 554; *Dennis v. Kennedy*, 19 Barb. 517.

<sup>4</sup> *Pipe v. Bateman*, 1 Iowa, 369; *McGreary v. Chandler*, 58 Me. 537; *Williams v. Bank of Mich.*, 7 Wend. 542, per Walworth, Ch.

any officer of the association or in the name of their trustees.<sup>1</sup> Nor can an action at law be maintained by one member against another, which involves an examination of the partnership accounts.<sup>2</sup> The directors of such an unincorporated joint-stock company stand in the relation of trustees to the stockholders; and any gain they may reap in the discharge of their official duties, and while they continue to be invested with the fiduciary capacities, inures to the benefit of the *cestuis que trustent*.<sup>3</sup>

The principal difference between unincorporated joint-stock associations and partnerships, relates to the effect of a transfer of a member's interest in the association. In the case of a partnership such a transfer, in the absence of an agreement to the contrary, as we have already seen, works a dissolution, as does likewise the death of a partner. In the case of joint-stock associations there is usually no *delectus personæ*, and a transfer by a member of his shares or the death of a member does not dissolve the association.<sup>4</sup>

<sup>1</sup> Niven v. Spickerman, 12 John. 401. See, also, McGreary v. Chandler, 58 Me. 537.

<sup>2</sup> Bullard v. Kinney, 10 Cal. 60.

No action can be maintained by the treasurer of an association, not incorporated, against one upon his promise in writing to pay money as a subscription, not to any person by name, but "to the treasurer" of the association alone. Ewing v. Medlock, 5 Port. 82.

<sup>3</sup> *In re Fry*, Treas., etc., 4 Phila. 129.

<sup>4</sup> Tyrrell v. Washburn, 6 Allen, 466; Tenney v. N. E. Protective Union, 37 Vt. 64. See, also, Troy Iron & Nail Factory v. Corning, 45 Barb. 231.

If by the articles of a trading association it is apparent that it was designed to consist of many members, who might from time to time cease to be interested in the concern, by voluntary withdrawal or death, and that the same business should be continued by those who should remain, and by such as might be added to their number under the terms of the articles, the death of one of them does not dissolve the association, and thus relieve others from liability to contribute for debts subsequently con-

tracted without their knowledge or consent. Tyrrell v. Washburn, *supra*.

In such an association as between retiring members and creditors of the company, such retiring members remain liable for all existing debts; and they may be liable for subsequent debts to creditors who had knowledge of their membership, but had no notice of their withdrawal. As among themselves, however, their rights and liabilities may be modified by special agreement. Tyrrell v. Washburn, *supra*.

The articles of an unincorporated joint stock company composed of three persons, provided in substance that either of the associates might sell any of his shares of stock, but that before selling to any other person, he should offer them to the association, and that no sale should give the purchaser any control in the business nor any interest in the profits, until scrip should be issued to him by the other associates: *Held*, that a sale of shares without an offer to the association was valid, but did not constitute the purchaser a partner, nor work a dissolution; but that the purchaser, being registered and getting his certificate,

As respects the forfeiture by a member of his interest in the company, the provision in the articles of agreement of a private joint-stock company, that upon default by a stockholder in payment of assessments, all his shares, right and interest in the associ-

could demand and receive dividends declared to his vendor, on a power of attorney from him. *Harper v. Raymond*, 3 Bosw. 29; S. C. 7 Abb. Pr. 142.

The implied promise of one holding moneys for a joint stock association in which the interests of the members are represented by certificates transferrable at will, must be understood to be, to make payment to those who are associates when suit is brought, and where one of the plaintiffs, who is a member when suit is brought, holds by assignment from one of the original associates, it is not necessary that the declaration mention the assignment, but it may count as upon an original promise to all the plaintiffs. *Willson v. Owen*, 30 Mich. 474.

In mining partnerships, as they exist in California, there is usually no *delectus personæ*, and as a consequence such a partnership is not dissolved by the death of a partner, or a sale of an interest by a partner to a stranger. *Taylor v. Castle*, 42 Cal. 367; *Jones v. Clark*, 42 Cal. 180; *Bainbridge on Mines*, 425.

A surviving partner has in such case no right to take control of the property as survivor, this right only applying where the *delectus personæ* exists. *Jones v. Clark*, 42 Cal. 180.

A stranger by his purchase of shares in such a partnership presumptively becomes a partner, though he takes no part in the management of the partnership affairs, and does not hold himself out to the world as a partner. *Taylor v. Castle*, 42 Cal. 367.

If a promissory note is binding on a mining partnership as a valid contract, such partnership continues liable, at least to the extent of the partnership assets, though some members of the

company have parted with their interests—the new members having purchased with knowledge subject to the payment of partnership debts. *Jones v. Clark*, 42 Cal. 180.

The recognized and established usage on the part of such a firm should be taken as a part of the contract of partnership. *Taylor v. Castle*, 42 Cal. 367. See, also, *Jones v. Clark*, *sup.*

So, unincorporated ditch companies organized for the sale of water to miners and others, the stock of which is bought and sold at the pleasure of the owners, without consulting the co-owners, differ from ordinary commercial partnerships. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them. *McConnell v. Denver*, 35 Cal. 365. A member of such a company has no general authority by virtue of his membership to bind the company by his contracts. *McConnell v. Denver*, *supra*.

Where, however, by the articles of agreement of an incorporated association for the regulation of their business affairs, it was stipulated that the capital stock should be divided into shares; that the shares should be transferrable; and that trustees should be appointed to manage the affairs, in whom all the property should vest in trust; and in accordance with these regulations trustees were appointed, who made purchases of real and personal property, and proceeded to the transaction of business; and shares were from time to time transferred, until 29-40ths of them were held by one person: *Held*, that a sale by him, not of his shares, but of 29-40ths of all the land and property which had belonged to the company, was a

ation and its property shall be forfeited, does not authorize the trustees by a naked declaration to make a forfeiture against which a court of equity will not grant relief.<sup>1</sup>

2—*Joint-stock companies organized under, or regulated by, statutes.*<sup>2</sup>

The principal legislation upon the subject of joint stock companies not possessing all the attributes of corporations, is to be found in the statute books of New York; and as the companies organized under the act of 1849, and the subsequent acts amendatory thereof, do business in many other States of the Union, these statutes have been thought of sufficient importance to warrant their being printed in a note.<sup>3</sup>

dissolution of the association; and that the persons who owned the shares at the time of the dissolution, were entitled, according to the number of their shares, to all the avails and assets of the company, and were liable to contribute in the same proportion to all the debts of the company. *Smith v. Virgin*, 33 Me. 148.

<sup>1</sup> *Walker v. Ogden*, 1 Biss. 287.

An incorporated joint stock association was formed to operate by trade and labor in a distant State. Its constitution divided the stock into shares of \$500, and provided that each member, by subscribing to render his personal labor, should be entitled to another share, but that desertion from the service should forfeit all his interest in the association. C. became a stockholder, but did not subscribe for personal services. He, however, authorized W., as his substitute, to labor and vote as representing his share abroad, and W. was permitted to vote and act accordingly, though he had never subscribed for stock. W. afterwards deserted the employment: *Held*, that the substitution conferred upon W. no share in the stock, and that C.'s interest in the association

was not forfeited by the desertion, although such forfeiture had been declared by the unanimous vote of the company. *Cox v. Bodfish*, 35 Me. 302.

<sup>2</sup> Not, however, including those possessing all the attributes of corporations. See the introductory note at the beginning of this chapter.

<sup>3</sup> The act of 1849 (Laws of New York, 1849, ch. 258, p. 389), "in relation to suits by and against joint stock companies and associations," is as follows:

"§ 1. Any joint stock company or association, consisting of seven or more shareholders, or associates, may sue and be sued, in the name of the president or treasurer, for the time being, of such joint stock company or association, and all suits and proceedings so prosecuted by or against such joint stock company or association, and the service of all process or papers in such suit and proceedings on the president or treasurer, for the time being, of such joint stock company or association, shall have the same force and effect as regards the joint rights, property and effects of such joint stock company or association, as if such suits and proceedings were pros-

With respect to the nature of the associations existing under these statutes, notwithstanding the fact that a considerable number

executed in the names of all the shareholders or associates, in the manner now provided by law.

"§ 2. No suit so commenced shall abate by reason of the death, removal or resignation of such president or treasurer of such joint stock company or association, or the death or legal incapacity of any shareholder or associate during the pendency of such suit; but the same may be continued by or against the successor of the officer in whose name such suit shall have been commenced.

"§ 3. The president or treasurer of any such joint stock company or association, shall not be liable in his own person or property by reason of any suit prosecuted, as above provided, by or against him, as the nominal plaintiff or defendant therein, provided that such president or treasurer shall not be exempted from any liability to which he may be otherwise legally subject as a stockholder or shareholder in such joint stock company or association.

"§ 4. Nothing herein contained shall be construed to deprive any plaintiff of the right, after judgment shall be obtained against any joint stock company or association, as above provided, from suing any or all of the shareholders or associates therein, individually, as now provided by law, or of the right to proceed, in the first instance, against the persons constituting any such joint stock company or association, in the manner now provided by law; but if it shall appear to any court in which any suit shall be prosecuted otherwise than is provided in the first section of this act, that the same is so prosecuted for the purpose of vexatiously and oppressively enhancing costs, such court shall not allow any more costs to be taxed and recovered in such suit than

would be taxable and recoverable in case such suit was prosecuted in the manner provided in the first section of this act.

"§ 5. Nothing herein contained shall be construed to confer on the joint stock companies or associations mentioned in the first section of this act, any of the rights or privileges of corporations, except as herein specially provided."

In 1851 (Laws of 1851, ch. 455, p. 838), the act of 1849 was amended as follows:

"§ 1. The act entitled," &c. \* \* \* "is hereby extended to any company or association composed of not less than seven persons, who are owners of or have an interest in any property, right of action or demand, jointly or in common, or who may be liable to an action on account of such ownership or interest; and the suits and proceedings authorized by said act may be brought and maintained in the manner therein provided, as well for any cause of action heretofore existing as for any that may hereafter accrue."

In 1853 (Laws of 1853, ch. 153, p. 283), the 4th section of the said act of 1849 was amended to read as follows:

"§ 4. Suits against any such joint stock company or association, in the first instance, shall be prosecuted in the manner provided in the first section of the said act; but after judgment shall be obtained against any such joint stock company or association, as above provided, and execution thereon shall be returned unsatisfied in whole or in part, suits may be brought against any or all of the shareholders or associates, individually, as now provided by law; but no more than one suit shall be brought and maintained against said shareholders at any one time, nor until the same shall have been determined, and execution

of cases seem to regard them as nothing more than partnerships, and governed by the same rules as partnerships, except so far as the statute has changed such rules,<sup>1</sup> as for example, respecting the method of suing and being sued, other and more authoritative

issued and returned, unsatisfied in whole or in part. No death removal, resignation of officers or shareholders, or sale or transfer of stock, shall work a dissolution of any such joint stock company or association as against the parties suing or being sued by such company, as herein provided, or as against any creditor or person having any demand against such company at the time of any such death, removal, resignation, sale or transfer."

In 1854 (Laws of 1854, ch. 245, p. 558), the previous acts upon the subject were amended and added to as follows:

"§ 1. Whenever, in pursuance of its articles of association, the property of any joint stock association is represented by shares of stock, it may be lawful for said association to provide by their articles of association that the death of any stockholder, or the assignment of his stock, shall not work a dissolution of the association; but it shall continue as before, nor shall such company be dissolved, except by judgment of a court for fraud in its management or other good cause to such court shown, or in pursuance of its articles of association.

"§ 2. Said association may also, by said articles of association, provide that the shareholders may devolve upon any three or more of the partners the sole management of their business.

"§ 3. This act shall in no way be construed to give said associations any rights and privileges as corporations."

In 1867 (Laws of 1867, vol. 1, ch. 289, p. 576), an act was passed to authorize joint stock companies and associations to purchase, hold and convey real estate as follows:

"SECTION 1. It shall be lawful for any joint stock company or associa-

tion to purchase, hold and convey real estate for the following purposes:

"1. Such as shall be necessary for its immediate accommodation in the convenient transaction of its business; or

"2. Such as shall be mortgaged to it in good faith, by way of security for loans made by or moneys due to such joint stock company or association; or

"3. Such as it shall purchase at sales under judgments, decrees or mortgages held by such joint stock company or association.

"The said joint stock company or association shall not purchase, hold or convey real estate in any other case or for any other purpose; and all conveyances of such real estate shall be made to the president of such joint stock company or association, as such president, and who, and his successors, from time to time, may sell, assign and convey the same, free from any claim thereon against any of the shareholders, or any person claiming under them, or any or either of them."

The provisions of the constitution of New York touching the question are as follows:

ART. 8, § 1. "Corporations may be formed under general laws."

Id. § 3. "The term corporations, as used in this article, shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships."

<sup>1</sup> See *Lafond v. Deems*, 52 How. Pr. 41; *S. C. 1 Abb. N. C. 318*; *Wells v. Gates*, 18 Barb. 554; *Dennis v. Kennedy*, 19 Barb. 517; *Moore v. Brink*, 4 Hun. 402; *S. C. 6 N. Y. Supreme Ct. 22*.

and well considered cases regard them substantially as corporations. With respect to the nature of these associations, Barnard, J., speaking in 1867, of joint-stock companies, organized under said statutes, said: "They are organized, not as simple partnerships, but with written articles of association framed under and with reference to the statute laws on the subject. The first act was passed in the year 1849. It was amended in the year 1851, and again in 1854. A further act passed at the session of 1867, authorized these companies to hold real estate in perpetual succession. By an examination of all these statutes, it will be found that joint-stock companies possess the following qualities or attributes of corporations: 1. They can, like corporations, sue and be sued in a single or collective name, to-wit, the name of their president or treasurer. 2. Their property or capital is represented in shares and certificates of stock, differing in no respect from shares and stock certificates in corporations. 3. The death of a member, his insolvency, or the sale or transfer of his interest, is not a dissolution of the company. 4. They have perpetual succession, or what is sometimes called the immortality of corporations. 5. They can take and hold real and personal estate in a collective capacity and in perpetual succession. These are all attributes of a corporation, and if we look into the books for elementary definitions, we shall find that corporations have no other attributes except the technical one of a common seal, to distinguish them from common-law partnership. On the other hand simple partnerships have none of the attributes or qualities here mentioned. Mere names are of but little importance. Looking at the substance and nature of things, it is plain that in respect to the absence of a common seal merely, the joint-stock associations are like partnerships. In the other and vastly more material respects mentioned, they are like corporations, although they are not declared to be such by the legislative acts referred to." \* \* \* "As to personal and individual liability, that is an incident both of partnerships and corporations, uniform and invariable in the one case, subject entirely to the legislative will in the other."<sup>1</sup>

So in *Westcott v. Fargo*,<sup>2</sup> it was held that the president or treasurer of a joint-stock company or association consisting of seven or more members, is, under the provisions of the act of 1849, amended by the act of 1853, ch. 153, and under the provisions of the consti-

<sup>1</sup> *Waterbury v. Merchants' Union Ex-press Co.* 50 Barb. 157; S. C. 3 Abb. Pr. N. S. 163.  
<sup>2</sup> 61 N. Y. 542.

tution (Art. 8), relative to corporations, to be regarded for the purposes of an action against the company substantially as a corporation sole.

So in *Sandford v. Supervisors of New York*,<sup>1</sup> it was held that joint-stock associations organized under the laws of 1849, ch. 258, and of 1854, ch. 245, are corporations by virtue of the constitution, notwithstanding the proviso of the act of 1854, that said "act shall in no court be construed to give said associations any rights and privileges as corporations," and that they are therefore liable to taxation on their capital.

The question has arisen and been decided in several cases, as to what is the status in other States of a joint-stock association organized under the statutes above referred to, and a diversity of opinion prevails upon the subject. In the recent case of *Fargo, Pres't of the Am. Exp. Co. v. Louisville, N. A. & C. Rwy. Co.*,<sup>2</sup> decided May 3, 1881, in the United States Circuit Court for the District of Indiana, it was held that a New York joint-stock company, possessing the right by the law under which it was organized, to sue and be sued in the name of its president or treasurer, was a citizen of the State of New York in the same sense that corporations are citizens of the States under whose laws they are organized; and that such joint-stock company might by the comity of States, sue and be sued in the name of such officer in the Federal courts, as a citizen of New York, even though shareholders of such joint-stock company were citizens of the same State as the adverse party to the suit. The court considered that in determining what such joint-stock companies are, regard was to be had to their essential attributes, rather than to any mere name by which they might be known; and that if the essential franchises of a corporation were conferred upon a joint-stock company, it was none the less a corporation, because the statute called it something else, or even designated it as an "unincorporated association."

<sup>1</sup> 15 How. Pr. 172.

See, however, *Bell v. Streeter*, N. Y. Trans. 26 Jan. 1872, p. 6. See the constitutional provision above referred to, quoted *supra* in the note containing the N. Y. statutes.

<sup>2</sup> 13 Chicago Legal News, 277. See, also, *Habicht v. Pemberton*, 4 Sandf. 658, per Duer, J.

When an association of persons assume a name, which implies a corporate body, and exercise corporate powers, they will not be heard to deny that they are a corporation. *United States Express Co. v. Bedbury*, 34 Ill. 459; *Clarkson v. E. & N. S. Dispatch*, 6 Bradwell, 284.

In *Cutler v. Thomas*,<sup>1</sup> it was said that the liability of individual members of an unincorporated joint-stock company formed in Canada, growing out of the association, must be judged of by the law of Canada, where the association was formed, and where their place of business was, though a bill of exchange drawn by them might be governed by the laws of the place where it is made payable.

On the other hand, in Massachusetts it is held that the statutes in question are local in their operation, as regards remedies for debt against the company; that in Massachusetts such a company is a mere partnership, and that the members may be sued in Massachusetts in the first instance as partners for such a debt, notwithstanding the provision of the New York statute that no suit shall be maintained on the demand against the individual members, until judgment has been rendered against the company in the name of the president or treasurer, and execution thereon returned unsatisfied.<sup>2</sup>

As to the method of organization, and the associations to which the statute applies, the act of 1849 did not, it seems, until extended by the act of 1851, apply to associations wherein the members were not shareholders or stockholders.<sup>3</sup> It is not, however, necessary to the existence of an association under the act of 1849, that there should be any subscription in writing by its members, and, although to endure longer than one year, it is not within the statute of frauds. The statute requires no greater formalities in that respect for its formation, than for the formation of an ordinary partnership.<sup>4</sup> It is not necessary that certificates of stock or scrip should be issued, or that a person should be formally declared a stockholder in order to entitle him to the rights and make him liable to the duties of membership; in order to become a proprietor it is only necessary that he should subscribe the articles of association.<sup>5</sup>

A social club, though without formal constitution and by-laws,

<sup>1</sup> 25 Vt. 73.

<sup>2</sup> *Taft v. Ward*, 106 Mass. 518; S. C. 111 id. 518; *Gott v. Dinsmore*, 111 id. 45.

<sup>3</sup> *Kingsland v. Braisted*, 2 Lans. 17.

<sup>4</sup> *Nat. Bank of Schuylerville v. Van Derwerker*, 74 N. Y. 234.

<sup>5</sup> *Dennis v. Kennedy*, 19 Barb. 517. See, also, *Wells v. Gates*, 18 Barb. 554.

Prior to the passage of the act of 1849

it was held that persons who subscribe for shares in a joint stock company and pay deposits, but do not comply with the full conditions of the association, and never become entitled to profits, are not liable for debts unless they are active in contracting them, or hold themselves out as partners. *West Point Foundry Ass'n v. Brown*, 3 Edw. Ch. 234.

and without purposes of profit or pecuniary advantage, may be held liable, in an action under the statute, as a joint-stock association, or association of seven or more persons having a common interest.<sup>1</sup>

The rights and capacities of joint-stock companies organized under said statutes, and the rights and liabilities of their members, have already been considered to some extent. As to the necessary parties to actions by and against such associations, it is not necessary under the statute that the individuals comprising the membership of such a company consisting of more than seven associates, should be made parties to an action by or against it. The action is well brought by or against the president or treasurer of the association, named as plaintiff or defendant.<sup>2</sup> An action against the president, secretary and treasurer is improperly brought.<sup>3</sup> In a complaint in an action by an officer of a joint-stock company, the allegation that the company is a joint-stock company or association consisting of more than seven shareholders

<sup>1</sup> *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300. *Contra*, *Park v. Simmons*, 10 Hun. 128.

<sup>2</sup> *Olery v. Brown*, 51 How. Pr. 92; *National Bank of Schuylerville v. Van Derwenter*, 74 N. Y. 234; *Tibbetts v. Blood*, 21 Barb. 650; *DeWitt v. Chandler*, 11 Abb. Pr. 459.

: A member of a voluntary unincorporated association for purposes of pleasure cannot maintain an action in his own name upon a contract made with the association, nor has he an interest therein which he can so transfer that his assignee can maintain an action against the contractor with the association. Nor can one member maintain an action at law in behalf of the association against another member upon any agreement made with the association. *McMahon v. Rauhr*, 47 N. Y. 67.

The statute of Conn. (Gen. Stat. tit. 1, § 65) provides that any number of persons associated as a voluntary association, not having corporate powers, but having some distinguishing name, may be sued by the name by which the association is known: *Held*, that a military company formed by voluntary

enlistment under the laws of the State, and known as "Co. G, Second Regiment, Conn. National Guard," was a voluntary association under the statute, and might be sued by that name. *Fox v. Narramore*, 36 Conn. 376.

Where such a company had occupied certain leased premises as an armory, and the commanding officer had received from the State a sum of money for the purpose of paying the rent of such premises, which money had not been paid to the lessor, but had been applied for the benefit of the company in another manner, it was *held* that the company was liable to the lessor in an action for money had and received, for the money so received by the commanding officer. *Fox v. Narramore*, 36 Conn. 376.

By statute in Ohio, an action to enforce against a partnership a liability of the firm, may be brought against the partnership either in the name of the firm or in the names of the partners who compose it, at the option of the plaintiff. See *Whitman v. Keith*, 18 Ohio St. 134.

<sup>3</sup> *Schmidt v. Gunther*, 5 Daly, 452.

or associates, is, under the act of 1849, a material and issuable allegation.<sup>1</sup> The complaint in such action need not, however, state the names of seven of the associates. It is sufficient if it avers that the association consists of seven associates and upward.<sup>2</sup> The provisions of the act of 1849 in relation to suits by and against joint stock companies and associations, have been held to refer only to unincorporated companies and associations.<sup>3</sup> But inasmuch as the later decisions already referred to regard joint-stock associations as *quasi* corporations, this decision must be regarded as qualified by them. The acts of 1849 and 1851 have been held not to embrace the fire companies of New York.<sup>4</sup> The acts of 1849 and 1851 conferred upon the officers therein authorized to sue and be sued, no right to sue except in cases where the shareholders or associates could before have prosecuted. The intent of the statutes was to obviate the inconvenience of joining all the shareholders or associates as parties; to facilitate an existing right of action, and not to create a new one.<sup>5</sup> Said acts were intended to apply to suits having in view a remedy against the joint property and effects of such companies and associations. Where, therefore, an action merely seeks to restrain an unincorporated association by injunction from carrying into effect its resolution of suspension against a member of the association, it is not within the meaning of said acts, and is not well brought against the president merely.<sup>6</sup>

<sup>1</sup> *Tiffany v. Williams*, 10 Abb. Pr. 204.

An action brought against "The City Club," of over seven persons, may be sustained where the complaint expressly charges that the defendants were members of and partners in an association or organization known as "The City Club," that existed on and prior to May, 1869, and up to Aug. 1, 1870 (during which time the claim was created by them), either as original debtors or as assignees of a lease (a balance of rent being claimed) for the two years, which is alleged to have been made to three of the defendants, by authority of the defendants, and as agents, and for and in behalf of all of them, and for their use, and which they used and enjoyed. *Waller v. Thomas*, 42 How. Pr. 337.

<sup>2</sup> *Tibbetts v. Blood*, 21 Barb. 650.

<sup>3</sup> *New York Marbled Iron Works v. Smith*, 4 Duer, 362.

<sup>4</sup> *Masterson v. Botts*, 4 Abb. Pr. 130.

<sup>5</sup> *Corning v. Greene*, 23 Barb. 33; affirmed, 26 N. Y. 472, note.

<sup>6</sup> *Rorke v. Russell*, 2 Lans. 244.

Persons who become members of a voluntary association which is neither a co-partnership nor a corporation, are bound by its rules, not being in conflict with the law of the land; and the courts can interfere no farther than to hold the association to a fair and honest administration of those rules. *White v. Brownell*, 4 Abb. Pr. (N. S.) 162; 2 Daly, 329. See, also, *Leech v. Harris*, 2 Brewst. 571; *Lowry v. Stotzer*, 7 Phila. 397.

A member is not bound by an ex-

The judgment in an action against the president under the statute, and execution thereon, are properly against the president as such, and they bind only the joint property of the association, not the individual property of the president, nor the separate property of the individual members.<sup>1</sup>

Under the act of 1849, as amended by the act of 1853, actions against a partnership or association, consisting of seven or more persons, must be brought against the president or treasurer of such association, and the remedy against their joint property exhausted before an action can be brought against one or more of the individual associates.<sup>2</sup> When the judgment and execution against the company fail to secure satisfaction of the debt, then an action against the associates directly is proper.<sup>3</sup> Under said acts no action lies against the individual members upon the judgment obtained against the company.<sup>4</sup> The judgment against the president for a debt owed by the company does not preclude the individual members, when sued for the same debt, from contesting their liability for the debts of the company.<sup>5</sup> At most, such judgment against the president can be no more than *prima facie* evidence in the plaintiff's favor, in a subsequent action against the associates. It will not maintain his right to recover, where the evidence shows that the judgment so recovered exceeds the amount for which the association or its members were liable in the action.<sup>6</sup> The liability of individual members of a joint-stock company, after judgment and execution returned unsatisfied against the company, under the act

cise of power on the part of his fellow members to which he has not assented, or which is not derived from the law of the land. *Leech v. Harris*, 2 Brewst. 571. See, also, *Lowry v. Stotzer*, 7 Phila. 397.

Equity will take cognizance of and enforce the rules and regulations of societies within the line of order, and to correct abuses. *Potter v. Search*, 7 Phila. 443. See, also, *Lowry v. Stotzer*, 7 Phila. 397.

Where there is open to an expelled member of a voluntary association a remedy under its constitution and laws for a review of the proceedings for his expulsion, and in case of error for his restoration, and the association is not a

partnership, equity will not interfere. *Olery v. Brown*, 51 How. Pr. 92; *White v. Brownell*, 2 Daly, 329; 4 Abb. Pr. (N. S.) 162.

<sup>1</sup> *National Bank of Schuylerville v. Van Derwerker*, 74 N. Y. 234; *Allen v. Clarke*, 65 Barb. 563.

<sup>2</sup> *Robbins v. Wells*, 18 Abb. Pr. 191; *S. C.* 26 How. Pr. 15; 1 Robt. 666; *Allen v. Clark*, 65 Barb. 563.

See, also, *Kingsland v. Braisted*, 2 Lans. 17.

<sup>3</sup> *Allen v. Clark*, 65 Barb. 563.

<sup>4</sup> *Witherhead v. Allen*, 3 Keyes, 562; *S. C.* 4 Abb. App. Dec. 628.

<sup>5</sup> *Allen v. Clark*, 65 Barb. 563.

<sup>6</sup> *Allen v. Clark*, *sup.*

of 1849, as amended by the act of 1853, is that of partners, and consists in the original demand against the company, not the judgment against it.<sup>1</sup> The complaint must therefore allege a subsisting cause of action against the company, on the original demand. Alleging that the company, became indebted to plaintiff for goods sold, without alleging a sum now due, or a breach in any form, is not enough, even where judgment and execution unsatisfied are alleged.<sup>2</sup> A creditor of a joint-stock association must proceed against the surviving shareholders before an action can be maintained against the representatives of a deceased shareholder.<sup>3</sup>

As to actions between a joint stock company and its members, it is not a valid objection to an action against a joint-stock company in the manner prescribed by the statute, that the plaintiffs are members of the company.<sup>4</sup> And where the articles of association of an unincorporated joint-stock company provide that the board of directors thereof may prosecute and recover in an action at law any and every assessment upon the shares of stock, an action against one of the associates to recover an assessment upon his stock may, under the articles and the act of 1849, be maintained in the name of the president of the association.<sup>5</sup>

As to actions between the members themselves, the rule does not appear to be different from that which prevails between the members of an ordinary partnership,<sup>6</sup> a subject which has already been considered in a preceding chapter.

<sup>1</sup> *Witherhead v. Allen*, 3 Keyes, 562; S. C., 4 Abb. App. Dec. 628, reversing S. C. 28 Barb. 661. Compare *Miller v. White* 50, N. Y. 137, reversing S. C. 10 Abb. Pr. N. S. 385; 59 Barb. 434. See, also, *Moore v. Brink*, 4 Hun, 402; S. C. 6 N. Y. Supreme Court, 22; *Kingsland v. Braisted*, 2 Lans. 17.

<sup>2</sup> *Witherhead v. Allen*, *supra*.

<sup>3</sup> *Moore v. Brink*, 4 Hun, 402; S. C. 6 N. Y. Supreme Court, 22.

<sup>4</sup> *Westcott v. Fargo*, 61 N. Y. 542; S. C. 6 Lans. 319; *Saltsman v. Shults*, 14 Hun, 256.

See, however, *Schmidt v. Gunther*, 5 Daly, 542.

<sup>5</sup> *Bray v. Farwell*, 3 Lans. 495.

<sup>6</sup> Where a note made by one member of a joint stock association (unincorporated)

ated) and indorsed by another for the purpose of raising money for the use of the association, is paid and taken up by a third, the latter cannot maintain an action against the maker and first indorser, to recover back the money advanced by him, until an account has been taken between the parties. *Crater v. Binger*, 45 N. Y. 545; S. C. 54 Barb. 155 (1865), following *Gridley v. Dole*, 4 N. Y. 486.

Plaintiff, defendant and others were shareholders in a joint stock enterprise to purchase and improve lands containing a mineral spring, and held such lands as tenants in common. Plaintiff made and paid for certain improvements, and assessed the cost ratably upon each shareholder. Plaintiff proved

Respecting real estate conveyed to a joint-stock association, it was held in *Howell v. Earp*,<sup>1</sup> that the right of such association to hold such real estate can only be questioned by the people.

In the settlement of the affairs of an unincorporated joint-stock association it is of no consequence as affecting the rights of the associates entitled to an interest therein, that the legal title to land belonging to the association has been taken in the name of one of the associates or in a third person<sup>2</sup>

As respects the consolidation of joint-stock companies, where the articles of association of a company prohibit the union or consolidation of the company with any other, without the consent of a majority of the stockholders, but contain a clause providing for an amendment of the articles by a concurrent vote of two-thirds of the executive committee, and a majority of the trustees, the authority to amend the articles of association gives no power to take away from the stockholders the power to prohibit the merging of the company with any other company, which they had expressly reserved for their own protection; and such authority to amend

that he made a statement to defendant of the amount assessed upon him; that defendant took the figures on a paper and said he "would pay him (plaintiff) the money;" would "be over in a few days and settle up—square up:" *Held*, that the admission of a liability, coupled with a promise to pay, was sufficient to authorize a recovery by plaintiff against defendant. *Wright v. Putnam*, 2 *Thomp. & Cook*, 455.

The charter of an incorporated company, after declaring that the stockholders should be jointly and severally personally liable for the payment of all debts or demands contracted by the company, and that any person having a demand against the company might sue any stockholder, etc., and recover the same with costs, further provided that before such suit upon any demand, etc., judgment must be obtained thereon against the company, execution issued and returned unsatisfied, etc.: *Held*, that the charter placed the stockholders upon the same footing as if they

had not been incorporated, making them answerable for demands against the company like partners; and consequently one stockholder, though a creditor of the company, could not maintain an action at law for his demand against the others or either of them: *Bailey v. Bancker*, 3 *Hill*, 188.

One member of a voluntary, unincorporated association for purposes of pleasure, cannot maintain an action at law in behalf of the association against another member upon any agreement made with the association: *McMahon v. Rauh*, 47 *N. Y.* 67.

As to the principles regulating contribution among the associates of a joint stock company, see *Morrissey v. Weed*, 12 *Hun*, 491.

<sup>1</sup> 21 *Hun*, 393.

As to the wife's not being entitled to dower in real estate held in trust by one of several persons, partners in a speculation, see *Nicoll v. Ogden*, 29 *Ill.* 323.

<sup>2</sup> *Barker v. White*, 58 *N. Y.* 204; *Butterfield v. Beardsley*, 23 *Mich.* 412.

should be construed as intended for such amendments as are pertinent to the business and objects for which the association was organized.<sup>1</sup>

In case of the consolidation of two joint-stock companies, although a dissenting shareholder, like a retiring partner in an ordinary partnership, is not obliged, in the absence of an express agreement to that effect, to surrender his interest in the property to his remaining associates at an estimated valuation, but has the right to have the valuation actually ascertained by a sale, in the ordinary manner of closing up partnerships where there is no express stipulation; yet, where the amount of dissentient stock is quite inconsiderable in comparison with the stock whose owners have acquiesced in the agreement of consolidation, the court will order the consolidated company to give bond with sureties, conditioned that, upon final judgment all the property transferred to it shall, if so required by the judgment, be delivered into the custody of the court, for the protection of all the shareholders.<sup>2</sup> Dissenting stockholders have no absolute right to have a sale at the commencement of the litigation, as soon as the property has been handed over to a receiver. If they are entitled to have the property sold, their right is to have it sold when they have recovered judgment. All they can claim is, that the property shall be preserved until judgment, so that their rights, as then ascertained and declared, may be enforced.<sup>3</sup>

The infidelity or misconduct of some or even all of the trustees or managers of a joint-stock association, affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it or taking away its management and placing it in the hands of an officer of the court. In such case, the principles of remedial or preventive justice go no farther than to enjoin or forbid the misconduct, or to remove the unfaithful officer.<sup>4</sup>

<sup>1</sup> *Blatchford v. Ross*, 54 Barb. 42; S. C. 37 How. Pr. 110.

<sup>2</sup> *McVicker v. Ross*, 55 Barb. 247; S. C. 37 How. Pr. 474.

<sup>3</sup> *McVicker v. Ross*, *supra*.

<sup>4</sup> *Waterbury v. Merchants' Union Express Co.* 50 Barb. 157; S. C. 3 Abb. Pr. N. S. 163.

A joint stock association, formed in the State of New York for the purpose of carrying on business in California for a definite period, the articles of which

contain a stipulation that the association shall not be dissolved before the expiration of the term limited for its duration, without the unanimous consent of the shareholders, cannot be voluntarily dissolved, except by the unanimous consent of all the shareholders; if such consent cannot be had, then application must be made to a court to decree a dissolution. *Von Schmidt v. Huntington*, 1 Cal. 55. It being found impracticable, however, to keep the company together,

Upon the dissolution of a joint-stock association, it is the duty of the trustees to convert the assets into money, and distribute the proceeds among the stockholders. They have no right to exchange the assets of the old association, or any portion thereof, for the stock of any corporation, without the consent of all the stockholders. A stockholder not consenting to such exchange may recover the value of his stock so wrongfully disposed of.<sup>1</sup>

or to prosecute successfully the contemplated enterprise, under the articles of association, the court decreed a dissolution and the distribution of the effects of

the company. *Von Schmidt v. Huntington*, *supra*.

<sup>1</sup> *Frothingham v. Barney*, 6 Hun, 366.



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